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RECORD & BRIEFS

No. 08-

IN THE

# Supreme Court of the United States

BEST WESTERN ENCINA LODGE & SUITES; ENCINA-PEPPER TREE, LTD.; JEANETTE WEBBER; CECILIA E. VILLINES,

*Petitioners.*

v.

HOLLYNN D'LIL,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a plaintiff has standing to assert an Americans with Disabilities Act ("ADA") claim solely for injunctive relief against a hotel even though the district court found that the plaintiff had not proven any intent to return to the hotel at the time she filed her complaint and that she had filed numerous complaints with similar allegations and never had returned to those hotels.

## PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, David Z. Webber was a defendant below. Mr. Webber is now deceased.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Best Western Encina Lodge & Suites, Encina-Pepper Tree, Ltd., Jeanette Webber, and Cecilia E. Villines respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-22a, is reported at 538 F.3d 1031. Its decision denying the petition for rehearing and rehearing en banc, Pet. App. 47a, is unreported. The opinion of the district court, Pet. App. 23a-46a, is reported at 415 F. Supp. 2d 1048.

## JURISDICTION

The court of appeals issued its judgment and opinion on August 12, 2008. Pet. App. 1a. A timely petition for rehearing and rehearing en banc was denied on October 6, 2008. *Id.* at 47a. On December 8, 2008, Justice Kennedy extended the time for filing this petition to and including February 3, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution, which provides:

> The judicial Power shall extend to . . . Cases . . . [and] Controversies . . . .

42 U.S.C. § 12182(a) (Title III of the Americans with Disabilities Act ("ADA")), which provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment . . . of any place of public accommodation . . . .

42 U.S.C. § 12188(a)(1), which provides that injunctive relief is available under Title III of the ADA to:

> any person who is being subjected to discrimination on the basis of disability . . . or who has reasonable grounds for believing that such person is about to be subjected to discrimination . . . .

## STATEMENT OF THE CASE

The decision below conflicts with this Court's interpretation of Article III of the Constitution, which requires a plaintiff who seeks injunctive relief to present concrete proof of a real and immediate threat of future injury in order to have standing to sue in federal court. The court of appeals diluted these requirements by holding that respondent has standing to pursue injunctive relief against a hotel under the Americans with Disabilities Act ("ADA"), notwithstanding the district court's findings – well-supported by an evidentiary hearing solely on the issue of Article III standing – that she had not proven any intent or concrete plans to return to the hotel at the time she filed her complaint. This holding also conflicts with the decisions of other federal courts that have been faithful to this Court's decisions and presents an issue of national importance due to the explosive growth of private ADA enforcement by repeat litigants who file complaints with similar allegations against numerous businesses.

### A. Statutory Background.

Congress enacted the ADA in 1990 in order to "remedy widespread discrimination against disabled individuals." *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 674 (2001). This case concerns Title III of the ADA, which prohibits discrimination in public accommodations, including hotels. See 42 U.S.C. §§ 12182(a), 12181(7)(A). Title III provides for private rights of action. *Id.* § 12188(a)(1). Under the ADA, damages are not available to individuals. Individuals may only sue to obtain injunctive relief. See *id.* (injunctive relief is available under Title III to "any person who is being subjected to discrimination on the basis of disability . . . or who has reasonable grounds for believing that such person is about to be subjected to discrimination"). Attorney's fees are recoverable under Title III in these actions seeking injunctive relief. *Id.* § 12205. In addition, some states, including California, provide for damages for those who prove they were the victims of disability-based discrimination.

Notwithstanding the ADA's broad purposes, Congress recognized that requiring existing structures to be retrofitted and rebuilt to accommodate individuals with disabilities would impose an unacceptable burden on businesses. Accordingly, Congress established different requirements for new construction undertaken after the ADA's enactment than for existing structures. Specifically, Congress required newly constructed facilities, *i.e.* "facilities for first occupancy later than 30 months after July 26, 1990," to be "readily accessible to and usable by individuals with disabilities." *Id.* § 12183(a)(1). In contrast, "existing facilities" must only incorporate accommodations for the disabled that are "readily achievable." *Id.* § 12182(b)(2)(A)(iv). As Congress

explained, the lower "readily achievable" standard for existing facilities "reflects the balance between the need to provide access for persons with disabilities and the desire to impose limited costs on businesses." H.R. Rep. No. 101-485, pt. 3, at 60 (1990). The higher "readily accessible" standard applies to "alterations" in public accommodations, but only where the alterations "affect[] or could affect the usability of the facility." 42 U.S.C. § 12183(a)(2).

**B. Factual Background.**

Petitioners are the owners[1] of the Best Western Encina Lodge in Santa Barbara, California, a hotel that was constructed long before the ADA and most of California's disabled access laws were enacted. The hotel consists of several buildings that were constructed between 1958 and 1980. Consistent with their obligations under the ADA and California law, petitioners have made numerous "readily achievable" upgrades to the facilities' original construction in order to make the facilities more accessible to the disabled: *e.g.*, they installed a ramp leading to the office and added disabled accessible parking.

Respondent Hollynn D'Lil is a paraplegic who requires a wheelchair for mobility. At the time of the evidentiary hearing below, she had filed 62 prior lawsuits under the ADA and California civil rights law and had received at least $378,000 in settlements from these suits. Transcript of Evidentiary Hearing Regarding Standing ("Evid. Hrg. Tr.") at 64, 96.[2]

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[1] Encina-Pepper Tree, Ltd. is a closely-held, limited partnership. The partnership independently owns and operates the Best Western Encina Lodge as a franchisee of Best Western International, Inc.

[2] This transcript is document 55 in the parties' excerpts of record in the Ninth Circuit.

Respondent works as an accessibility consultant for ADA plaintiffs' attorneys, as well as local governments and businesses. *Id.* at 35-36.

On December 13, 2001, respondent traveled from her home in Sacramento, California to Santa Barbara to conduct multiple sub rosa property inspections for an ADA plaintiffs' attorney. *Id.* at 37, 44. Earlier that day, after calling several other hotels, the Encina Lodge allegedly informed her that a wheelchair-accessible room was available.[3] She proceeded to reserve a room. However, when respondent arrived at the hotel, she encountered what she believed to be numerous architectural barriers to wheelchair access in both her room and the common areas of the hotel. She nevertheless stayed at the hotel that night and the next night. *Id.* at 49; see also *id.* at 78-79 (testifying that she did not "have any thought about checking out of the Best Western" and staying at another hotel).

After respondent's stay, she did not write a letter to the hotel requesting that the alleged problems she encountered be corrected. *Id.* at 68. Instead, she filed the instant lawsuit on December 13, 2002, a full year after her stay. She provided no explanation for waiting one year to file the lawsuit and conceded that she did not ask her counsel to expedite the filing of the case. *Id.*

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[3] Respondent Webber testified that the hotel's policy in December 2001 was to inform potential guests that the hotel "did not have completely accessible guest rooms"; rather, that it had "partially accessible" rooms that could accommodate wheelchairs, but did not have features such as "roll-in showers and bars on the toilets." Evid. Hrg. Tr. at 106-07.

### C. Proceedings Below.

**Respondent's Lawsuit.** Respondent's suit sought injunctive relief under Title III of the ADA, injunctive relief and damages under California civil rights law, and attorney's fees and costs, based on numerous alleged ADA violations. Pet. App. 3a. Petitioners challenged respondent's standing to bring suit in their motions to dismiss and for partial summary judgment, but those challenges were rejected. *Id.* at 3a n.3.

The case was litigated for more than two years. During this time, respondent demanded extensive reconstruction of the hotel based on the fact that petitioners had undertaken air conditioning upgrades, exterior work, re-tiling, re-painting, and re-carpeting, which respondent argued constituted "alterations" that triggered a statutory obligation to make the hotel "readily accessible" through reconstruction and retrofitting. When the case was set to go to trial, the parties entered into a consent decree, which was approved by the district court on January 11, 2005.[4] Without admitting liability or any of the allegations in respondent's complaint, petitioners agreed to undertake extensive renovations to the hotel in order to make it more accessible to disabled patrons, including numerous upgrades to common areas and the provision of four fully accessible guestrooms. The consent decree reserved the issue of attorney's fees and costs for future resolution. Pet. App. 3a.

When respondent filed a motion for attorney's fees, the district court expressed concerns about her standing and issued a sua sponte order requiring the

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[4] The consent decree is document 40 in the parties' excerpts of record in the Ninth Circuit.

parties to address that issue. Pet. App. 3a. The parties subsequently filed briefs and an evidentiary hearing was held on September 22, 2005, at which respondent was the principal witness. At that hearing, respondent's counsel failed to ask her any questions concerning her intent to return to Santa Barbara or the Encina Lodge as of December 13, 2002, the date the complaint was filed. Instead, respondent's counsel asked some questions about her intentions and future plans as of the date of the hearing (which took place more than two-and-a-half years later). *Id.* at 34a-35a.

With respect to these intentions, respondent testified that she had a trial coming up in Santa Barbara in November and had been "talking about taking a vacation" in Santa Barbara to visit friends. Evid. Hrg. Tr. at 54-55. She conceded, however, that she did not yet have a place to stay for the upcoming trial, *id.* at 55, and there is no testimony as to whether she either had contacted or planned to contact the Encina Lodge in connection with her potential future stays. She also mentioned the possibility of "doing some more work in Solvang," but she testified about attempting to evaluate the Ramada in Santa Barbara as potential lodging for that possible stay, not the Encina Lodge. *Id.* at 50. Moreover, the Encina Lodge would hardly be the most convenient option for a trip to Solvang because Solvang is approximately 33 miles north of Santa Barbara and contains many hotels.

Respondent also testified concerning her past visits to Santa Barbara. See *id.* at 45 (testifying that she visited Santa Barbara three times in 2001 and then an average of "one to two times a year" in 2002 and thereafter). In addition, respondent testified that she would prefer to stay at the Best Western Encina

Lodge rather than other Santa Barbara hotels that are accessible because the Encina Lodge is "simple" and "easy" since "you park close to your room, and it has a place to eat." *Id.* at 58; see also *id.* at 57, 62 (testifying that other hotels either are "very expensive," require her to travel with an assistant, or have "problems").

Significantly, respondent conceded with respect to six ADA lawsuits that she had brought and settled against six different hotels in Redding, California – all arising out of a visit to Redding on a single day in March 2002 – that she had never been back to any of the hotels, had never attempted to go back to any of the hotels, and had never even contacted the hotels to find out if the remediation had been completed. *Id.* at 92-95; see also *id.* at 95 (respondent's recovery from the six Redding lawsuits was $90,000).

**District Court Decision.** The district court held that respondent failed to prove her standing to sue at the time the action was filed because her testimony failed to "[a]ddress[] [t]he [r]elevant [i]ssue." Pet. App. 34a. Specifically, the district court found that she "provided no evidence that her injury was 'actual or imminent,' as opposed to 'conjectural or speculative,' *as of December 2002*" because she presented no testimony as to "her intention – as of December 13, 2002 – to return to Santa Barbara, her plans for returning to Santa Barbara, and her intention to stay at the Encina Lodge if it were made accessible." *Id.* at 34a-35a. Moreover, the district court noted that "[b]ecause questions relating back to 2002 were so obviously relevant and could so easily have been addressed, the Court can only assume the answers would not have established standing." *Id.* at 35a.

Even though the district court noted that its function was not "to speculate about what case a plaintiff might have been able to present if she had focused on the relevant issues," it nevertheless "consider[ed] whether the record suggests evidence that might have been able to establish standing if the issue had been properly addressed." Pet. App. 36a. On this score, the district court concluded that the record contained no such evidence. See *id.* at 37a ("it is nearly impossible to determine what Plaintiff's plans and intent might have been in 2002 based on her testimony about present plans"). Indeed, the district court examined numerous factors and concluded that none of them assisted respondent in establishing standing. For example, the district court noted that respondent admitted that "she never stayed at the Encina Lodge before the stay at issue" and that she did not prove "that she has frequented other Best Western hotels or that she has a preference for Best Western hotels." *Id.* In addition, the district court found that respondent's testimony as to her frequency of travel to Santa Barbara was "inconsistent" and "somewhat exaggerated" as compared to her summary judgment declaration. *Id.* at 43a. The district court specifically found that it could not "find evidence – as of December 13, 2002 – of any future plans to travel to Santa Barbara for business." *Id.* at 45a.

With respect to respondent's intentions to return to the Encina Lodge specifically, the district court found respondent's testimony that she would choose the Encina Lodge over other Santa Barbara hotels to be "somewhat curious," "evasive," and "not credible." Pet. App. 39a-40a. In this regard, the court observed that respondent's claim of preference for smaller

hotels was not credible in light of her history of patronizing large ones. *Id.* at 41a.

The court also noted that respondent had failed to return to any of the six hotels in Redding, California that she also sued and obtained settlements against. Pet. App. 41a. It reasoned that "[s]tatements made by Plaintiff in connection with those other lawsuits are certainly relevant to her credibility here." *Id.* at 42a n.14. Specifically, the district court concluded:

> [I]t appears Plaintiff declares that she intends to return to nearly every place she sues (as indeed she must in order to establish standing in federal court). While some of these allegations may have initially been accepted in other cases without question, even at the trial stage, as more suits are filed and more – and contradictory – allegations are made, credibility concerns increase.

*Id.* at 42a. Ultimately, the district court concluded that it was "not convinced of the sincerity of Plaintiff's allegations of her desire to stay at Encina Lodge." *Id.*

**Ninth Circuit Decision.** A split panel of the Ninth Circuit reversed the district court's decision with respect to standing.[5] The panel majority conceded that respondent "was never explicitly asked whether she intended to return [to the Encina Lodge] as of December 13, 2002." Pet. App. 12a. It nevertheless concluded that "that she so intended is the obvious and most reasonable inference to be drawn from her testimony." *Id.* In reaching this conclusion, the court of appeals neither addressed the district

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[5] The panel majority also addressed other issues that are not relevant here.

court's express evidentiary finding to the contrary nor provided any rationale for rejecting the district court's finding. Indeed, in support of its "reasonable inference," the panel majority made several findings concerning respondent's testimony at the evidentiary hearing that are directly contrary to the district court's assessment of that same evidence. For example, in stark contrast to the district court's findings, the panel majority found that respondent's testimony showed that she "regularly visited Santa Barbara both before and after she filed the complaint" and that she "would prefer to stay at the Best Western Encina Lodge during her regular visits to Santa Barbara if it were made accessible." *Id.* at 12a-13a. The panel majority also noted that a "careful review" of respondent's testimony showed that "she had at least one concrete plan to return to the Santa Barbara area at the time she filed suit." *Id.* at 13a n.9 (citing possible business trip to Solvang).

The panel majority further stated that respondent's desire to return to the Encina Lodge was "well supported by the evidence that she submitted at each successive stage of the litigation." Pet. App. 10a. Accordingly, the panel majority quoted and relied on portions of the complaint and respondent's summary judgment declaration in support of its inferences. *Id.* at 10a-11a.

The panel majority also held that "[t]o the extent that" the district court's concerns about respondent's credibility "might be viewed as an adverse credibility finding," it "reject[ed] the legal reasoning on which such finding is based." Pet. App. 14a. The panel majority noted that the district court had "focused particularly on [respondent's] past ADA litigation" and stated that it could not agree "that [respondent's]

past ADA litigation was properly used to impugn her credibility." *Id.* at 14a, 16a. Indeed, the majority went so far as to suggest that taking respondent's past litigation conduct into account in evaluating her credibility might violate her First Amendment rights. *Id.* at 15a.

Judge Rymer dissented from the panel majority's standing ruling, stating that the majority "improperly" "decline[d] . . . to accept the district court's finding that [respondent] failed to provide evidence of her intent to return to the Best Western Encina as of the time her complaint was filed." Pet. App. 18a. In this regard, Judge Rymer noted that "the district court found that [respondent] had adduced *no* evidence as to her intent to return to Santa Barbara or to the Best Western (if accessible) as of December 2002, when the action was brought" and that "[t]he record discloses no such evidence." *Id.* at 19a-20a.

Judge Rymer further criticized the majority for failing to "defer[] to the district judge's assessment" and instead "decid[ing] for itself what 'the obvious and most reasonable inference to be drawn from [respondent's] testimony' is." Pet. App. 19a. Relatedly, Judge Rymer noted that the majority improperly relied on the complaint and summary judgment filings because those documents are supposed to "fall by the wayside once an evidentiary hearing is held." *Id.*

Finally, Judge Rymer disagreed with the majority's rejection of the district court's concerns about respondent's credibility. She noted that the district court did not question respondent's credibility based on her history of ADA litigation, but instead "reasoned that *statements* [respondent] made in connection with other lawsuits are relevant to

credibility." Pet. App. 21a. She further noted that the district court's reasoning is "surely correct, for to the extent that [respondent] *represented* in prior lawsuits that she intended to return to the place of accommodation at issue in those cases in the reasonably near future, yet never has, the sincerity of a similar expression of intent in this lawsuit . . . is called into question." *Id.*; see also *id.* (suggesting that respondent has "made so many commitments to return to so many places of public accommodation in so many different locales that returning to the place at issue in this case – the Best Western Encina – is infeasible or, at least, implausible").

The Ninth Circuit denied rehearing and rehearing en banc.

## REASONS FOR GRANTING THE PETITION

### I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The decision below merits review because it conflicts with this Court's constitutional standing jurisprudence requiring concrete proof of a real and immediate threat of future injury to pursue injunctive relief. See Sup. Ct. R. 10(c) (a consideration favoring review on certiorari is where a federal court of appeals "decided an important federal question in a way that conflicts with relevant decisions of this Court").

Parties seeking to "invoke the power of federal courts" must satisfy the threshold requirement imposed by Article III of the Constitution that they "must allege an actual case or controversy." *O'Shea* v. *Littleton*, 414 U.S. 488, 493 (1974) (citing cases). "[A]n essential and unchanging part of th[is] case-or-controversy requirement" is the doctrine of standing.

*Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citing *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). This Court has defined the "irreducible constitutional minimum of standing" as including "injury in fact": the "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations and quotations marks omitted). "Abstract injury is not enough." *Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983). Instead, "[p]laintiffs must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of' important questions of federal law. *Id.* (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

In the context of injunctive relief, this Court has further held that standing principles require the plaintiff to show that he "has sustained or is *immediately* in danger of sustaining some direct injury" as the result of the challenged conduct. *Lyons*, 461 U.S. at 102 (internal quotation marks omitted; emphasis added); *see also id.* at 105 (plaintiff must show a "*real and immediate threat*" of repeated injury); *id.* at 110 (same). In particular, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea*, 414 U.S. at 495-96.

As a procedural matter, this Court has held that it is the plaintiff's burden to establish standing. *Lujan*, 504 U.S. at 561 ("The party invoking federal jurisdiction bears the burden of establishing these elements."). This is not a mere pleading requirement; rather, as "an indispensable part of the plaintiff's case," each element of standing "must be supported in

the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* (citing *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883-89 (1990)). In addition, the evidence relating to the standing inquiry consists of the facts as they existed at the time the complaint was filed. See *id.* at 569 n.4 ("The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*") (internal quotation marks omitted).

The Ninth Circuit has now abandoned core components of this framework. Although the court of appeals paid lip service to the foregoing principles, *see* Pet. App. 7a-8a, it plainly ignored them in overturning the district court's finding that respondent failed to substantiate her alleged intent to return to the Encina Lodge at the time her complaint was filed. Specifically, the court of appeals' decision conflicts with this Court's standing decisions in three ways.

*First*, the court of appeals' decision conflicts with this Court's holding that a plaintiff must establish that standing existed at the time the action was filed. *Lujan*, 504 U.S. at 569 n.4. After holding an evidentiary hearing specifically designed to provide respondent with a full and fair opportunity to establish her standing as of the time the action was filed, the district court unequivocally determined that respondent failed to satisfy this fundamental burden: "Plaintiff provided *no evidence* that her injury was 'actual or imminent,' as opposed to 'conjectural or speculative,' *as of December 2002.*" Pet. App. 34a (first emphasis added); see also *id.* at 35a ("Plaintiff was asked *no questions* that would elicit" the relevant testimony) (emphasis added). Moreover, the district

court expressly found that respondent's failure was not a mere technical oversight: "Because questions relating back to 2002 were so obviously relevant and could so easily have been addressed, the Court can only assume the answers would not have established standing." *Id.*

The court of appeals' holding that respondent had standing to assert a claim for injunctive relief even though the district court found that she had not proven any intent to return to the Encina Lodge at the time the complaint was filed simply flies in the face of *Lujan*, *Lyons*, and *O'Shea*. Those cases unequivocally require a plaintiff to demonstrate a "real and immediate threat" of repeated injury at the time suit is filed – and not some later time. See *Lyons*, 461 U.S. at 105, 110; *Lujan*, 504 U.S. at 569 n.4. By failing to present any evidence that she had concrete plans or intentions to return to the hotel when the complaint was filed, respondent failed to show that the hotel posed a "real and immediate threat" of harm to her at that critical time. Simply put, if she had no plans to patronize the hotel again at the time she filed her complaint, then she had no personal stake in the injunctive relief that she sought and, therefore, no standing. Under *Lujan*, *Lyons*, and *O'Shea*, that should have been the end of the matter.

*Second*, even aside from the timing issue, the court of appeals' analysis is irreconcilable with the standing principles that this Court set forth in *Lujan*, *Lyons*, and *O'Shea*. In spite of respondent's failure to present evidence of her intent to return to the hotel at the time the complaint was filed, the district court and the court of appeals both examined the evidence that she presented regarding her plans and intentions *at the time of the evidentiary hearing* to determine "whether the record suggests evidence that

might have been able to establish standing if the issue had been properly addressed." Pet. App. 36a; *id.* at 12a (purporting to draw "inference[s]" from the record). The district court and the court of appeals, however, came to starkly opposite conclusions with respect to what the evidence showed: the district court concluded that it was "impossible to determine what Plaintiff's plans and intent might have been in 2002 based on her testimony about present plans," *id.* at 37a; for its part, the court of appeals concluded that the record evidence established respondent's standing. *Id.* at 9a.[6]

The court of appeals was able to reach this conclusion only by diluting – if not abandoning – principles that this Court set forth in *Lujan*, *Lyons*, and *O'Shea*. For example, the court of appeals cited respondent's prior visits to Santa Barbara as confirmation of her intent to return. Pet. App. 9a-10a. But, as Justice Scalia stated for the Court in *Lujan*, "[t]hat the [plaintiff] 'had visited' the areas . . . before . . . proves nothing." *Lujan*, 504 U.S. at 564. In addition, the Court expressly noted in *Lyons* that "[p]ast" events are insufficient to "show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Lyons*, 461 U.S. at 102 (internal quotation mark omitted; alteration and omission in original).

The court of appeals also abandoned any semblance of adhering to the requirement that a plaintiff must show a "real" and "imminent" threat of injury to have

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[6] Judge Rymer is no doubt correct that the Ninth Circuit's failure to "defer[] to the district judge's assessment" of the evidence was blatantly inconsistent with the clearly erroneous standard of review, but that issue does not present a separate reason to grant certiorari. *See* Pet. App. 19a.

standing to seek injunctive relief. *Lujan*, 504 U.S. at 564; *Lyons*, 461 U.S. at 105, 110.[7] The court of appeals' standing determination was based on its conclusion that "[a] careful review of [respondent's] testimony . . . shows that she had at least one concrete plan to return to the Santa Barbara area at the time that she filed suit." Pet. App. 13a n.9 (citing respondent's testimony that she "thought [she] would be doing some more work in Solvang," Evid. Hrg. Tr. at 50). Under this Court's precedent, it strains credulity to suggest that this single, unelaborated statement about work that respondent "thought" she might get in another city at an unspecified future time could establish a "real" or concrete plan on respondent's part to return to the Encina Lodge, much less an "imminent" plan to do so.[8]

"Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative . . . that the injury is *certainly* impending." *Lujan*, 504 U.S. at 564 n.2 (internal

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[7] Title III's injunctive relief provision effectively incorporates the "real and imminent" threat requirement of this Court's standing decisions. *See* 42 U.S.C. § 12188(a)(1) (injunctive relief is available under Title III to "any person who is being *subjected to* discrimination on the basis of disability . . . or who has reasonable grounds for believing that such person is *about to be subjected to* discrimination") (emphases added).

[8] In any event, as noted, the district court concluded that the record did not contain "evidence – as of December 13, 2002 – of any future plans to travel to Santa Barbara for business." Pet. App. 45a; *see also id.* at 40a-41a ("There is no evidence of how often she might have intended to visit Solvang as of 2002, or for what purpose, except that it appears to be business-related.") The court of appeals also ignored that when testifying about a possible trip to Solvang, respondent testified that she was considering *the Ramada* for her lodging.

quotation marks omitted). Here, respondent's testimony established, at best, "an injury at some indefinite future time," a showing that this Court specifically has held insufficient to establish "imminence," particularly where "the acts necessary to make the injury happen are at least partly within the plaintiff's own control," as they plainly were here. *Id.* In such circumstances, this Court has insisted that any "injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred." *Id.*

In sum, the court of appeals' conclusion that respondent's suggestion of a possible future business trip that might bring her near Santa Barbara at an unspecified time was sufficient to establish standing is flatly inconsistent with this Court's unequivocal holding that "'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury" that this Court's cases require. *Id.* at 564.

*Third*, the court of appeals ignored this Court's express holding that the plaintiff's burden is to establish each element of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561; *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883-89 (1990). Specifically, this Court has held that for cases that have proceeded beyond the pleading and summary judgment stages to the "final stage," facts relevant to the standing inquiry "must be supported adequately by the evidence adduced" at a hearing. *Lujan*, 504 U.S. at 561 (internal quotation omitted).

Here, even though the district court held an evidentiary hearing at which respondent testified and was subject to cross-examination, the court of appeals

relied on allegations in the complaint and statements from respondent's summary judgment declaration in support of its factual "inferences." See Pet. App. 10a-11a. This reliance plainly was improper because once a case is at its "final stage" and the plaintiff's sworn testimony has been tested through cross-examination, allegations in the complaint cannot be assumed to be true and statements in a declaration cannot be viewed in a light most favorable to the plaintiff. These principles should have particular force in the ADA standing context, where the inquiry turns on "facts" that are entirely within the plaintiff's knowledge and control. Accordingly, the court of appeals' use of the complaint and summary judgment declarations to fill in gaps in the factual record was contrary to this Court's precedent.

Both individually and collectively, these rulings represent a stark departure from this Court's standing jurisprudence. The Ninth Circuit has effectively rendered null the requirement that an ADA plaintiff seeking injunctive relief demonstrate that she faces a "real and imminent" threat of injury by the entity she is suing. As a result, owners of public accommodations in the Ninth Circuit face the prospect of unbounded lawsuits by individuals who come into contact with them on even a single occasion, and have no "real" intent of returning. This plays into the hands of ADA plaintiffs who make it their business (literally) to sue owners of public accommodations and have no "personal stake" in the remediation that they seek. See, *infra*, Section III. The Ninth Circuit's abandonment of standing

principles established by this Court warrants this Court's review.[9]

## II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS THAT REQUIRE ADA PLAINTIFFS SEEKING INJUNCTIVE RELIEF TO PRESENT ROBUST PROOF OF IMMINENT INJURY.

The decision below conflicts with decisions of other courts of appeals that have rigorously applied this Court's standing jurisprudence in the context of plaintiffs seeking injunctive relief under the ADA and other statutes. In *Shotz* v. *Cates*, 256 F.3d 1077, 1082 (11th Cir. 2001), for example, the Eleventh Circuit affirmed the dismissal of an ADA complaint seeking injunctive relief with respect to alleged architectural barriers at a courthouse where the plaintiffs alleged only "past incidents of discrimination" and had not attempted to return to the building nor "alleged that they intend to do so in the future." *Id.* at 1082. The court of appeals noted that the likelihood of future discrimination was

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[9] There is no merit to the court of appeals' claim that it was justified in "tak[ing] a broad view of constitutional standing . . . where, as under the ADA, private enforcement suits are the primary method of obtaining compliance with the Act." Pet. App. 7a (internal quotations omitted). This Court consistently has refused to relax or disregard Article III standing principles "for the sake of convenience and efficiency." *Raines* v. *Byrd*, 521 U.S. 811, 820 (1997). Nor is it relevant that the ADA is a remedial statute. Article III's bedrock principles do not bend, which is why this Court has adhered to its standing principles in the context of other remedial statutes such as the Clean Water Act, *see Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000), and the Endangered Species Act, *Lujan*, 504 U.S. 555.

merely "conjectural, hypothetical, or contingent." *Id.* (internal quotation omitted).

Similarly, in *Access for America, Inc.* v. *Associated Out-Door Clubs, Inc.*, 188 F. App'x 818 (11th Cir. 2006) (per curiam), the Eleventh Circuit affirmed the dismissal of an ADA complaint seeking injunctive relief against a greyhound track because the plaintiff "could not demonstrate that there was any reasonable chance of his revisiting the Track, other than 'someday.'" *Id.* at 818. The court of appeals deemed insufficient the plaintiff's statements signaling an intent to make "spontaneous" trips to the track "in certain months and during certain vacations." *Id.* at 819 (Barkett, J., dissenting) (internal quotation marks omitted).

In *Animal Legal Defense Fund, Inc.* v. *Espy*, 23 F.3d 496 (D.C. Cir. 1994), which did not involve the ADA, the D.C Circuit analyzed one of the plaintiff's standing to challenge a Department of Agriculture regulation by rigorously evaluating "the immediacy rather than the specificity of [her future] plan[s]." *Id.* at 500. The court of appeals found standing lacking where the plaintiff had "merely state[d] that at some undefined future time" she would "engage in further [conduct carrying the risk of injury]." *Id.* at 500 (internal quotation marks omitted). Even that was "in part not literally true," the court of appeals observed, because "[s]he will not be *required* to do so"; "[w]hether she will do so is wholly within her control." *Id.* The court of appeals declined to "say that the injury she seeks to litigate is 'certainly impending,'" where no such injury will be suffered "unless she makes a further choice to subject herself to it." *Id.* at 501 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)).

Other courts of appeals, like the Ninth Circuit here, however, have exhibited a willingness to relax the quantum of evidence necessary to show "real and imminent" injury and concrete plans to return in the ADA context. In *Camarillo* v. *Carrols Corp.*, 518 F.3d 153, 158 (2d Cir. 2008) (per curiam), for example, the Second Circuit found that the plaintiff had standing to assert a claim under Title III of the ADA against restaurant owners based on: (1) her allegation of *past* injury under the ADA; (2) the court of appeals' inference from her complaint that the discriminatory treatment was likely to continue; and (3) the court's inference, based on the *past* frequency of her visits and the proximity of defendant's establishments to her home, that she intended to return at some unspecified time "in the future." *Id.* The court of appeals ignored the district court's finding that she "did not allege facts" sufficient to establish standing. *Id.* at 155.[10]

Similarly, in *Steger* v. *Franco, Inc.*, 228 F.3d 889 (8th Cir. 2000), the Eighth Circuit held that an ADA plaintiff had standing to seek injunctive relief against an office building based solely on the facts that he had visited it a single time and testified that he "frequently visits government offices and private businesses" in the same city for his job. *Id.* at 891-92. The court of appeals did not even address whether the plaintiff had any future plans – "concrete" or otherwise, "some day" or any day – to return to the building or even to the city at the time he filed suit.

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[10] *But see Freydel* v. *New York Hospital*, 2000 WL 1836755, at *5-*6 (2d Cir. Dec. 13, 2000) (unpub.), where the Second Circuit held that a plaintiff who sought injunctive relief under the ADA against a hospital failed to show a real and immediate threat of repeated injury because she had visited the hospital only once and showed only that she "'may" be referred there in the future.

In addition, at the district court level, numerous cases are in tension with or flatly contradict the outcome reached by the decision below. For instance, the court in *Blake* v. *Southcoast Health System, Inc.*, 145 F. Supp. 2d 126 (D. Mass. 2001), firmly rejected the panel majority's notion that standing can be expanded beyond its constitutional parameters to "tak[e] into account the broader policy concerns that specifically underlie the ADA." *Id.* at 134. While "recogniz[ing] that the ADA was fashioned to 'provide a clear and comprehensive national mandate' for the elimination of discrimination against individuals with disabilities," *id.*, the court observed that "every court to have considered the standing requirements under Title III of the ADA has held that in order for a private litigant to prove standing, she must show a risk of future harm." *Id.* at 132-33. In its absence, "the important policy concerns that the ADA embodies are insufficient to give rise to standing." *Id.* at 134.

Indeed, several district courts have found standing lacking on facts similar to those here. In *Rosenkrantz* v. *Markopoulos*, 254 F. Supp. 2d 1250 (M.D. Fla. 2003), for example, the court held that the plaintiff lacked standing to seek injunctive relief against a hotel under Title III because he "lives hundreds of miles away," had only been to the target location "once," and had an "irregular, occasional, and infrequent" travel history to the area. *Id.* at 1253. In addition, the court noted that "[p]laintiff's future travel plans are just 'some day' intentions and lack any description of concrete plans or anything more definite than that he will travel to the . . . area in the next year or two probably." *Id.*

Similarly, in *Brother* v. *Tiger Partner, LLC*, 331 F. Supp. 2d 1368 (M.D. Fla. 2004), the district court

held that the plaintiff lacked standing to seek injunctive relief against a hotel under Article III because the record evidence contradicted his assertion that he planned to return to the hotel: the plaintiff lived more than 280 miles away, admitted that he traveled to the area only about twice a year, and lacked "a continuing connection" to the subject property. *Id.* at 1373 (internal quotation marks omitted). The court also discredited his stated intent to return to the property because he was "involved in a multitude of lawsuits against the hotel industry" and "countless other hotels" were located near places he claimed an intent to visit, "including hotels that [the plaintiff] is suing." *Id.* at 1373-74. See also *Brother* v. *CPL Invs., Inc.*, 317 F. Supp. 2d 1358, 1369 (S.D. Fla. 2004) (same plaintiff lacked standing to sue different hotel where court would not credit his stated intent to return because he never stayed at the hotel, cancelled a subsequent reservation, and had been involved in at least 50 other ADA lawsuits in Florida).[11]

Other courts likewise have concluded that a plaintiff's prior history of repeat ADA litigation is relevant to assessing the credibility of the plaintiff's stated intent to return to a particular facility – in accord with the district court decision and panel dissent below but in conflict with the panel majority.

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[11] *See also Deck* v. *American Haw. Cruises, Inc.*, 121 F. Supp. 2d 1292, 1299 (D. Haw. 2000) (no standing under ADA to sue cruise line where the plaintiff stated only that she would "look into" another trip on defendant or another cruise line in the near future) (internal quotation omitted); *Harris* v. *Del Taco, Inc.*, 396 F. Supp. 2d 1107, 1113-16 (C.D. Cal. 2005) (no standing under ADA to sue restaurant despite the plaintiff's affidavit that he would return because the plaintiff lived nearly 600 miles away and had only visited the restaurant once (after pulling off the highway) prior to filing suit.

In *Tiger Partner*, 331 F. Supp. 2d at 1374-75, for example, the court stated:

> [I]n view of his extensive litigation history, Mr. Brother's professed intent to return to the property is insufficient. Indeed, to satisfy Article III's standing requirements, Mr. Brother has professed an intent to return to all fifty-four of the properties he has sued. This is simply implausible.

Similarly, in *Molski* v. *Mandarin Touch Restaurant*, 385 F. Supp. 2d 1042 (C.D. Cal. 2005), the court found that Mr. Molski's expressed intent to return to the defendant's restaurant was "even more questionable" than Mr. Brother's stated intent in *Tiger Partner* because Mr. Molski had previously sued "400 or more businesses spread across the entire state of California" and his "own track record demonstrates that he rarely returns to the businesses that he sues." *Id.* at 1046. See also *Rodriguez* v. *Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1279, 1284-85 (M.D. Fla. 2004) (finding that ADA plaintiff "lack[ed] credibility" and "did not convey any honest desire to return" to hotel because his 200 prior ADA lawsuits and testimony "left the distinct impression that he is merely a professional pawn in an ongoing scheme to bilk attorney's fees from the Defendant").

In sum, different federal courts have taken different approaches to Article III standing principles in the ADA context, which has led to disparate treatment of similarly situated plaintiffs. In particular, the Ninth Circuit's holding that respondent has standing to pursue her claim in federal court is irreconcilable with the holdings of numerous federal courts, including sister Circuits, that plaintiffs in virtually indistinguishable circumstances do not. Article III deserves a uniform interpretation; access

to a federal court should not depend on the fortuity of geography. Only this Court can ensure that Article III is applied consistently.

## III. THE COURT OF APPEALS' ADA STANDING RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

The court of appeals' dilution of this Court's standing principles in the ADA context also presents a recurring and "important question" of federal law that warrants this Court's attention. See Sup. Ct. R. 10(c).

The court of appeals' decision, if left standing, will have enormous impact on ADA litigation in the Ninth Circuit as well as nationwide, and must be understood in the context of the explosive growth in recent years of aggressive private enforcement of Title III of the ADA, including lawsuits that do little to vindicate the ADA's laudatory purpose of fully integrating the disabled into society. Catalyzed by the emergence of overlapping state law damages remedies in jurisdictions including California, as well as the availability of substantial attorney's fees, ADA plaintiffs and their attorneys now pursue large monetary recoveries, along with injunctive relief, in federal court.

The ability so readily to profit from ADA private enforcement has given rise to what several federal courts have described as a "cottage industry" in such litigation. See, *e.g.*, *Rodriguez*, 305 F. Supp. 2d at 1280-81. In numerous jurisdictions – California, Hawaii, Florida, Illinois, and New York, among others – repeat cases are now routinely filed by a relatively small number of plaintiffs (and their counsel), who assume the role of private attorneys general, *id.*, and for whom "the means for enforcing

the ADA (attorney's fees) have become more important and desirable than the end (accessibility for disabled individuals)," *Tiger Partner*, 331 F. Supp. 2d at 1375. Federal courts have labeled these litigants "professional plaintiffs," "serial plaintiffs," and "professional pawn[s]." See, *e.g.*, *Rodriguez*, 305 F. Supp. 2d at 1285; *Molski* v. *Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 863-68 (C.D. Cal. 2004).

Courts have explained that the *modus operandi* of these plaintiffs is to visit as many businesses as possible to identify potential ADA violations. See *Molski*, 347 F. Supp. 2d at 863. Rather than encourage voluntary compliance by notifying the business of potential violations and attempting "conciliation," *Rodriguez*, 305 F. Supp. 2d at 1281, the plaintiffs simply sue – often on a delayed basis to permit statutory penalties rapidly to accrue. The resulting lawsuits often request damages that would force the targeted establishments into bankruptcy, see *Molski*, 347 F. Supp. 2d at 863. The specter of costly litigation compounded by the risk of a potentially fatal adverse judgment induces most businesses targeted by this cottage industry to settle promptly. See, *e.g.*, *Doran* v. *Del Taco, Inc.*, 373 F. Supp. 2d 1028, 1030 (C.D. Cal. 2005), *vacated on other grounds*, 237 F. App'x 148 (9th Cir. 2007). It is an economically rational response to "'an old Chicago-style shakedown.'" Carol J. Williams, *Disabled Man's Crusade a Bane to Business Owners*, L.A. Times, Jan. 5, 2009, at col. 1, *available at* http://www.latimes.com/news/local/la-me-adasuits5-2009jan05,0,7595452,full.story. Indeed, some businesses have been forced to defend against identical claims of competing plaintiffs over the same facilities. See *Rodriguez*, 305 F. Supp. 2d at 1282 n.13.

From 1992 to 2003, the number of Title III lawsuits filed in California federal courts increased by over 6000 percent. See Cari Becker, *Private Enforcement Of The Americans With Disabilities Act Via Serial Litigation: Abusive Or Commendable?*, 17 Hastings Women's L.J. 93, 107 n.102 (2006); see also Walter Olson, *The ADA Shakedown Racket*, The City J. (Winter 2004), *available at* http://www.city-journal.org/html/14_1_the_ada_shakedown.html). Indeed, California has the dubious honor of being named by the American Tort Reform Association as among the nation's "Judicial Hellholes" due to the proliferation of ADA litigation, especially in the Los Angeles area. Am. Tort Reform Found., *Judicial Hellholes 2008/2009*, at 15-16 (2008), *available at* http://www.atra.org/reports/hellholes/report.pdf. The experience of Florida federal courts has been comparable: a virtual "explosion of private ADA-related litigation" solely "driven by economics – that is, the economics of attorney's fees." *Rodriguez*, 305 F. Supp. 2d at 1281-82.

The value of this serial litigation in vindicating the purposes of the ADA is a subject of legitimate debate. While it may result in some public accommodations becoming more accessible to the disabled, it may do so by forcing already-compliant businesses – *e.g.*, businesses with facilities that pre-date the enactment of the ADA and that satisfy the "readily achievable" standard – to undertake costly retrofitting solely to avoid litigation and by (mis)directing limited remedial resources toward facilities that particular litigants choose as convenient targets for settlements rather than facilities the accessibility of which would more broadly benefit the disabled community.

Whatever the benefits of this litigation, however, it imposes significant burdens on the targeted

businesses and the judicial system. Businesses face potentially bankrupting ADA litigation by plaintiffs who visit their establishments on a single occasion and have no provable prospect of ever returning. To avoid the time, cost and harmful publicity of defending lawsuits, businesses and their insurers agree to coercive settlements rather than pursue valid ADA defenses. In addition, the integrity of the bar is called into question, and the public's confidence in the courts is impaired. See *Doran*, 373 F. Supp. 2d at 1031. Moreover, disabled individuals themselves are harmed, for while access may incrementally improve, the spirit and purpose of the ADA is undermined. *Molski*, 347 F. Supp. 2d at 867. In particular, vexatious litigation tactics create a backlash against the very disabled persons who rely on the ADA to vindicate their rights.

In the context of this litigation explosion, Article III standing principles play a critical role in enabling federal courts to distinguish between cases in which the plaintiff has a real and personal stake in the injunctive relief that they are seeking against the particular business and cases in which the plaintiff does not. Indeed, lack of standing is a commonly asserted defense to Title III suits brought by repeat plaintiffs, whose boilerplate assertions of intent to return to a subject property often do not withstand scrutiny, particularly when coupled with plaintiffs' exceptionally poor track records of returning to facilities they have previously sued.

Here, however, the Ninth Circuit has largely eviscerated this Court's standing principles in the ADA context by holding that a serial ADA plaintiff has standing to seek injunctive relief from a place of public accommodation, notwithstanding well-supported findings by the district judge after an

evidentiary hearing that she failed to prove any intent to return at the time her complaint was filed and has failed to return to other establishments she has sued. The inevitable result will be further proliferation of the vexatious litigation tactics described in this petition, and an increase in all of the social and economic costs that they impose. Accordingly, the Ninth Circuit's standing ruling poses a question of fundamental importance that warrants this Court's review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE
# Supreme Court of the United States

BEST WESTERN ENCINA LODGE & SUITES; ENCINA-PEPPER TREE, LTD.; JEANETTE WEBBER; CECILIA E. VILLINES,

*Petitioners,*

v.

HOLLYN D'LIL,

*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## RESPONDENT'S BRIEF IN OPPOSITION

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May 2009

## QUESTION PRESENTED

Whether a plaintiff has standing to maintain an Americans with Disabilities Act (ADA) claim against a hotel if the plaintiff demonstrates an intent to return to the area where the hotel is located and a desire to stay at the hotel if it were made accessible.

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## RESPONDENT'S BRIEF IN OPPOSITION

Petitioners seek this Court's review of a fact-bound decision that correctly applied well-established Article III standing principles to an Americans with Disabilities Act (ADA) claim for injunctive relief. Petitioners have failed to show any compelling reason to grant the writ. First, petitioners argue that the decision below conflicts with this Court's constitutional standing jurisprudence, but review of the decision shows that the court of appeals faithfully applied the applicable standing principles to the record in this case. Second, petitioners claim that the decision below conflicts with the decisions of other courts, but every case cited by petitioners rests on the same legal standards, and any differences in outcomes are easily explained by differences in the facts of each case. Finally, petitioners employ attention-grabbing catch-phrases such as "judicial hellhole" and "vexatious litigation" in an attempt to suggest that their policy arguments against the ADA's private enforcement scheme inject an important issue of law into this fact-bound case. The petition for a writ of certiorari should be denied.

## STATEMENT

On December 13, 2001, Hollynn D'Lil checked into a room at the Best Western Encina Lodge & Suites in Santa Barbara, California (Best Western Encina). D'Lil, who requires a wheelchair for mobility, had been told when she reserved the room that it was fully wheelchair accessible, except for its lack of a roll-in shower. Pet. App. 2a. When she arrived, however, she discovered numerous barriers to accessibility, such as a lack of van-accessible parking spaces near the rooms designated wheelchair accessible; door hardware, heating controls, and lamps that were too high or too far from a clear path for her to use; and a

bathroom that was blocked by furniture and had a toilet that was too low to the ground. *Id.* at 2a-3a. On December 13, 2002, D'Lil filed this suit under Title III of the Americans with Disabilities Act of 1990 (ADA) and California civil rights laws.

The case was settled pursuant to a consent decree that required defendants to construct fully ADA compliant guestrooms and to improve access to other facilities, including the public restrooms, swimming pool, and restaurant. The consent decree reserved the issue of attorney's fees. After D'Lil filed a motion for fees and defendants responded, the district court *sua sponte* ordered the parties to address D'Lil's standing. The parties briefed the issue, and the district court held an evidentiary hearing, after which it decided that D'Lil lacked standing, finding that she had not presented sufficient evidence to show that she intended to return to the Best Western Encina at the time she filed her complaint. *Id.* at 34a-36a.

The court of appeals reversed. The court explained that, to establish standing, a plaintiff must show that she has suffered an actual or imminent injury in fact, *id.* at 7a, and further explained that the "evidence relevant to the standing inquiry consists of 'the facts as they existed at the time the plaintiff filed the complaint.'" *Id.* (citations omitted). Where the place of public accommodation being sued is far from a plaintiff's home, the court went on, the plaintiff can establish an injury sufficient to confer standing by demonstrating an intent to return to the geographic area and a desire to visit the public accommodation if it is made accessible. *Id.* at 9a.

The court found that, on the record in this case, "there can be little doubt" that D'Lil demonstrated that, at the time she filed her complaint, she intended to return to the Santa Barbara area and desired to stay at the Best Western Encina if it were made accessible. *Id.* The court noted that D'Lil regularly visited Santa Barbara before, during, and after her stay at the Best Western Encina. In particular, D'Lil's declaration and testimony at the evidentiary hearing demonstrated that from 1993 to 2000 she visited the area approximately one to three times per year for work, that she took three trips to the area in 2001, that she took four trips to the area between her stay at the Best Western Encina and when she filed her declaration, and that, at the time of the evidentiary hearing, she was planning on taking three additional trips to the area. *Id.* at 9a-10a. The court also found that "D'Lil's desire to stay at the Best Western Encina on future trips to Santa Barbara if it were made accessible" was "well supported by the evidence that she submitted at each successive stage of the litigation," *id.* at 10a, including in her complaint, where she specifically stated that she would like to return to the hotel, and at the evidentiary hearing, where she explained why she would want to stay there if it were fully accessible. *Id.* at 11a.

The court of appeals found "somewhat baffling" the district court's conclusion that D'Lil had not presented evidence of her intent, at the time the complaint was filed, to return to the Best Western Encina. *Id.* at 12a. "That she [intended to return as of December 13, 2002] is the obvious and most reasonable inference to be drawn from her testimony," it explained. *Id.* The court pointed out that D'Lil's testimony established that "she was a frequent

traveler to Santa Barbara during the relevant time period," and that "she had at least one concrete plan to return to the Santa Barbara area at the time she filed suit." *Id.* at 13a. Moreover, the court noted that D'Lil had provided detailed reasons in her testimony for why she would like to stay at the Best Western Encina if it were made accessible, and that because she had not returned to the hotel since she filed suit, her "stated reasons for preferring the Best Western Encina at the evidentiary hearing were necessarily based on impressions of the hotel that were formed, and that she held, at the time that she stayed there and subsequently filed suit." *Id.* at 13a-14a. The court concluded that D'Lil's testimony "plainly evidence[d]" an intent to return to the Best Western Encina at the time she filed her complaint, and, therefore, she had established an actual or imminent injury sufficient to confer standing. *Id.* at 14a.

Finally, the court addressed concerns that the district court had raised about D'Lil's credibility based on her involvement in past ADA litigation and the fact that she had not yet returned to six hotels in Redding that she had previously sued. First, the court noted that although the district court expressed concerns, it had "explicitly declined to decide the credibility issue." *Id.* at 14a. The court pointed out that there was no evidence in the record about whether the six hotels had been made accessible so that D'Lil could return. Moreover, it explained, "whether or not D'Lil visited the hotels in Redding says little about her intent to visit the Best Western Encina, considering that D'Lil identified specific reasons . . . for returning to Santa Barbara," and the district court's "speculation about the plausibility of D'Lil's intent to return to each place of

public accommodation that she sued is further undermined by evidence of D'Lil's extensive and frequent travel throughout the state." *Id.* at 16a. Overall, the court concluded that the district court's statements on credibility did not disturb its "conclusion that D'Lil sufficiently established her standing to sue." *Id.* at 14a.

Judge Rymer dissented in part, disagreeing with the majority over whether the district court's credibility concerns were justified and over whether D'Lil showed "any concrete plan or intent to return to the Best Western Encina as of the time she filed her complaint." *Id.* at 22a. Defendants' petitions for rehearing and rehearing en banc were denied, with no judge requesting a vote on whether to rehear the matter en banc. *Id.* at 47a.

## REASONS FOR DENYING THE WRIT

### I. The Decision Below Is Consistent with This Court's Standing Jurisprudence.

Petitioners' primary argument for review is that the decision below "conflicts with this Court's constitutional standing jurisprudence." Pet. 13; *see generally Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *O'Shea v. Littleton*, 414 U.S. 488 (1974). But in all three ways in which petitioners claim there is a conflict, the court of appeals expressly followed this Court's precedents.

First, although petitioners contend that the decision below "conflicts with this Court's holding that a plaintiff must establish that standing existed at the time the action was filed," Pet. 15, the court of appeals expressly stated that "[t]he evidence relevant to the standing inquiry

consists of the facts as they existed *at the time the plaintiff filed the complaint.*" Pet. App. 7a (citations and internal quotation marks omitted) (emphasis added). And the court specifically held that D'Lil demonstrated her "intent to return *at the time that she filed suit.*" *Id.* at 14a (emphasis added). Thus, petitioners' suggestion that the court of appeals held that D'Lil could establish standing even if she had not proven any intent to return to the Best Western Encina at the time she filed her complaint is without merit, and the claimed conflict with this Court's decisions in *Lujan*, *Lyons*, and *O'Shea* is illusory.

Similarly, although petitioners claim that the court of appeals did not adhere "to the requirement that a plaintiff must show a 'real' and 'imminent' threat of injury to have standing," Pet. 17-18 (citing *Lujan*, 504 U.S. at 564; *Lyons*, 461 U.S. at 105, 110), the court of appeals expressly stated that plaintiff needed to show an "actual or imminent" injury, Pet. App. 7a (quoting *Lujan*, 504 U.S. at 560-61), and specifically held that D'Lil had done so. *Id.* at 14a. Petitioners assert that the court erred in discussing D'Lil's prior visits to the Santa Barbara area, arguing that a past injury does not show a present case or controversy. Pet. 17. But the court of appeals did not cite D'Lil's past visits to show that those visits alone established her standing. Rather, the court of appeals noted that "the regularity with which she visited the city before, during, and after her stay at the Best Western Encina," Pet. App. 9a-10a, demonstrated that she was a "frequent traveler to Santa Barbara during the relevant time period." *Id.* at 13a. Petitioners also argue that a statement D'Lil made about her upcoming work in the Santa Barbara area did not establish a real or imminent plan on her part to return.

Pet. 18. But the court of appeals did not rely only on that statement to conclude that D'Lil had a "concrete plan to return to the Santa Barbara area at the time she filed suit[,]" but also on the fact that D'Lil had spent an afternoon looking for an accessible hotel for that trip, and thus "had already begun to plan for [a specific upcoming trip] at the time that the complaint was filed." Pet. App. 13a n.9.

Finally, contrary to petitioners' claim that "the court of appeals ignored this Court's express holding that the plaintiff's burden is to establish each element of standing 'with the manner and degree of evidence required at the successive stages of the litigation[,]'" Pet. 19 (quoting *Lujan*, 504 U.S. at 561), the Ninth Circuit stated explicitly that each of the elements of standing must be supported "with the manner and degree of evidence required at the successive stages of litigation." Pet. App. 7a (quoting *Lujan*, 504 U.S. at 561). Petitioners further assert that the court below erred by relying on the complaint and summary judgment declaration even though the district court had held an evidentiary hearing, but the summary judgment declaration was admitted into evidence at the hearing. Transcript of Evidentiary Hearing Re: Standing at 85-86 & 110 (admitting summary judgment declaration as Exhibit 102). Moreover, the court of appeals concluded that D'Lil's *testimony* evidenced an intent to return to the Best Western Encina sufficient to confer standing. Pet. App. 14a. Thus, there is no conflict between the decision below and this Court's standing jurisprudence.

In the end, petitioners' claim of multiple departures from this Court's precedents is, at most, a simple disagreement with the court of appeal's application of

properly stated rules of law to the facts of this case. Even if the court below had erred in its application of the law to the facts, this case would not be worthy of this Court's review. *See* S.Ct. R. 10. But the court of appeals did not err. Rather, it concluded correctly that D'Lil had standing because her testimony demonstrated her intent, at the time she filed suit, to return to the Santa Barbara area and stay at the Best Western Encina if it were accessible. The petition should be denied.

## II. The Decision Below Does Not Conflict with the Decision of Any Other Court.

Petitioners claim that there is a circuit split regarding the degree of rigor with which the courts of appeals apply this Court's standing jurisprudence in cases where plaintiffs seek injunctive relief under the ADA. Pet. 21. But an examination of the cases petitioners cite reveals no such conflict.

Petitioners rely primarily on *Shotz v. Cates*, 256 F.3d 1077, 1082 (11th Cir. 2001), in which the Eleventh Circuit affirmed the dismissal of an ADA complaint for lack of standing to seek injunctive relief because the plaintiffs had not even alleged any intent to return to the building at issue. *Shotz* is easily distinguished from this case because the court below determined that D'Lil's testimony established her intent to return to the Best Western Encina at the time that she filed suit. Pet. App. 14a. Petitioners also rely on the Eleventh Circuit's unpublished decision in *Access for America, Inc. v. Associated Out-Door Clubs, Inc.*, 188 F. App'x 818 (11th Cir. 2006) (per curiam), but under Eleventh Circuit Rule 36-2, an unpublished decision of that court is not binding circuit

precedent. Thus, *Access for America* cannot establish a circuit split because no court is bound to follow the decision. In any event, *Access for America* does not conflict with the decision below because it affirmed in cursory fashion a dismissal for lack of standing to seek injunctive relief where the plaintiff "could not demonstrate that there was any reasonable chance of his revisiting" the facility at issue. *Id.* at 818. Again, in this case, the court of appeals concluded that D'Lil had made such a demonstration. Pet. App. 14a.

Petitioners also assert that the decision below conflicts with the D.C. Circuit's decision in *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496 (D.C. Cir. 1994), but that case did not involve the ADA or an analysis of a plaintiff's intent to return to a place where she had been subjected to unlawful conditions. Rather, *Animal Legal Defense Fund* was an Administrative Procedure Act (APA) challenge to an agency regulation. The court found that one plaintiff lacked standing to seek injunctive relief because she had not shown an injury presently suffered or imminently threatened where she "merely state[d] that at some undefined future time" she might again engage in activities that she had not pursued during the previous six years, *id.* at 500, and that the other plaintiff's claim "amount[ed] to nothing more than an attempt to compel executive enforcement of the law, detached from any factual claim of injury," *id.* at 501. In contrast, the court below concluded that D'Lil had demonstrated a specific intent to return to the Best Western Encina at the time she filed suit and, therefore, had "suffered an 'actual or imminent' injury sufficient to confer standing." Pet. App. 14a. Because the plaintiffs in *Animal Legal Defense Fund* were not

similarly situated to the plaintiff in this case, the decisions do not conflict.

Having cited only three appellate cases that they claim conflict with the decision below—none of which presents an actual conflict—petitioners attempt to bolster their claim of a circuit split by citing two cases that they assert are consistent with the Ninth Circuit's decision here. Pet. 23 (citing *Camarillo v. Carrols Corp.*, 518 F.3d 153, 158 (2d Cir. 2008) (per curiam); *Steger v. Franco, Inc.*, 228 F.3d 889, 891-92 (8th Cir. 2000)). Because the petitioners have failed to identify any appellate decisions that conflict with the decision below, their citation of non-conflicting decisions by other courts provides no basis to grant review. Rather, that the Second Circuit in *Camarillo* and the Eighth Circuit in *Steger*, like the court below, have found that plaintiffs have standing to pursue ADA claims where they intend to return to the offending establishments shows that there is no compelling reason for this Court to address the question presented here.

Unable to show any conflict at the appellate level, petitioners cite a handful of district court decisions that they claim "are in tension with or flatly contradict the outcome reached by the decision below." Pet. 24. But the cases petitioners cite apply the same law as the court below—the outcomes differ only because of differences in the facts. For example, petitioners cite *Blake v. Southcoast Health System, Inc.*, 145 F. Supp. 2d 126 (D. Mass. 2001). But the court in *Blake*, noting that "every court to have considered the standing requirements under Title III of the ADA has held that in order for a private litigant to prove standing, she must show a risk of future harm[,]" *id.* at 132-33, held that a decedent's estate lacks

standing to seek injunctive relief under the ADA because the decedent cannot further be harmed by the discrimination, *id.* at 137. *Blake* does not conflict with the decision here because D'Lil's testimony demonstrated that she was at risk of future harm because she intended to return to Santa Barbara and desired to stay at the Best Western Encina if it were accessible. Pet. App. 14a.

Petitioners also cite *Rosenkrantz v. Markopoulos*, 254 F. Supp. 2d 1250, 1253 (M.D. Fla. 2003), in which the district court dismissed the plaintiff's ADA complaint against a motel for lack of standing because the plaintiff failed to demonstrate "anything but a speculative or conjectural future injury." The plaintiff in *Rosenkrantz* traveled only twice a year and on a route that "comes nowhere near" the defendant motel, had been to the area of the motel only once, and had no specific plans to ever return. *Id.* The decision in *Rosenkrantz* does not conflict with the decision below because both decisions applied this Court's decision in *Lujan*. The results differed only because of factual differences between the two cases. As opposed to the plaintiff in *Rosenkrantz*, D'Lil was a frequent traveler to the area of the defendant hotel and had specific plans for future trips to the area at the time she filed her suit. Pet. App. 9a-14a. Similarly, in *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368 (M.D. Fla. 2004), the district court applied the same standing jurisprudence as the court below but found that the plaintiff lacked standing based on facts different from those presented by D'Lil. The plaintiff in *Brother* discovered the defendant hotel by chance while driving an indirect route to his destination, did not stay at the hotel, does not ordinarily travel to the area where the hotel is

located, professed only a general intent to return to the area, and gave inconsistent testimony about his frequency of travel. *Id.* at 1371.

Finally, petitioners assert that the decision below conflicts with three district court decisions that considered a plaintiff's history of ADA litigation in assessing the credibility of a plaintiff's professed intent to return to a particular facility. Pet. 25-26 (citing *Brother*, 331 F. Supp. 2d at 1374-75; *Molski v. Mandarin Touch Rest.*, 385 F. Supp. 2d 1042, 1046 (C.D. Cal. 2005); *Rodriguez v. Investco, LLC*, 305 F. Supp. 2d 1278, 1279, 1284-85 (M.D. Fla. 2004)). The cases cited by petitioners do not demonstrate a conflict with this case for three reasons. First, the court below did not hold that litigation history may never be considered in assessing the credibility of a professed intent to return, but instead noted that "[t]he attempted use of past litigation to prevent a litigant from pursuing a valid claim in federal court warrants [the court's] most careful scrutiny." Pet. App. 15a (citing *Outley v. City of New York*, 837 F.2d 587, 592 (2d Cir. 1988)). Second, in this case, "the district court explicitly declined to decide the credibility issue[.]"[1] Pet. App. 14a. Third, to the extent the district court focused on D'Lil's history of ADA litigation as a basis for questioning the sincerity of her intent to return to the Best Western

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[1]Even if the question presented included whether litigation history is relevant to determine the credibility of a plaintiff's intent to return, this case would be a poor vehicle to address the issue because the district court did not decide it. Further, the court of appeals found it unnecessary to reach significant due process issues raised by D'Lil regarding the scope of the evidentiary hearing with regard to prior litigation. Pet. App. 4a n.4.

Encina, the court of appeals rejected any "purported adverse credibility determination" under the facts of this case because "D'Lil identified specific reasons" for returning to Santa Barbara and for wanting to stay at the Best Western Encina if it were made accessible. *Id.* at 16a. In contrast, in the cases cited by petitioners, the plaintiffs offered only generalized statements of an intent to return.

In sum, petitioners have not identified any decisions that conflict with the decision below on an issue of law. At most, petitioners have identified cases where courts reached different results because of different facts. There is no reason to believe that the outcome of this case would have been any different had it been litigated in another forum, and there is no reason for this Court to review the decision below.

## III. Petitioners' Policy Disagreement with the ADA's Private Enforcement Mechanism Does Not Provide a Basis to Grant the Petition.

The final section of the petition criticizes Congress's decision to rely on a private right of action as a means of promoting the ADA's goal of equal access for people with disabilities. *See* Pet. 27-31. Petitioners argue that serial litigation aimed at ensuring compliance with the law has imposed burdens on businesses and the judicial system, even as petitioners acknowledge that "[t]he value of this serial litigation in vindicating the purposes of the ADA is a subject of legitimate debate." *Id.* at 29; *see* Cari Becker, *Private Enforcement Of The Americans With Disabilities Act Via Serial Litigation: Abusive Or Commendable?*, 17 Hastings Women's L.J. 93 (2006). Whatever the merits of petitioners' criticism of the statutory scheme, such

criticism does not provide a basis for this Court to grant review. The court below faithfully applied the applicable standing principles to the record in this case and concluded that D'Lil had "demonstrate[d] her intent to return to the Santa Barbara area and, upon her return, her desire to stay at the Best Western Encina if it is made accessible." Pet. App. 9a. If petitioners believe that the ADA is in need of reform they should seek a legislative solution because "[o]nly Congress can respond to vexatious litigation tactics that otherwise comply with its statutory frameworks." *Brother*, 331 F. Supp. 2d at 1375.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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# REPLY BRIEF

No. 08-993

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IN THE

# Supreme Court of the United States

BEST WESTERN ENCINA LODGE & SUITES; ENCINA-PEPPER TREE, LTD.; JEANETTE WEBBER; CECILIA E. VILLINES,

*Petitioners,*

v.

HOLLYNN D'LIL,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## INTRODUCTION

Petitioners demonstrated that the decision below conflicts with this Court's constitutional standing jurisprudence requiring concrete proof of a real and imminent threat of future injury to pursue injunctive relief. Respondent's opposition fails to show otherwise. Contrary to respondent's claim, the decision below also conflicts with that of other federal courts that have faithfully applied this Court's standing requirements. Finally, respondent fails to refute petitioners' showing that this case raises a recurring and important question of federal standing law because the court of appeals' dilution of standing principles in the ADA context has and will contribute to the proliferation of private enforcement actions in which plaintiffs have no personal stake in the injunctions they seek.

## REASONS FOR GRANTING THE PETITION

### I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

Petitioners demonstrated (Pet. at 13-21) that the decision below merits review because it conflicts with this Court's holdings under Article III that plaintiffs must proffer concrete proof of a real and imminent threat of future injury to pursue injunctive relief. Respondent's attempt to reconcile the court of appeals' decision with those cases is unavailing.

This Court's recent decision in *Summers* v. *Earth Island Institute*, 129 S. Ct. 1142 (2009), confirms the disconnect between the Ninth Circuit's ruling and this Court's standing doctrine. In *Summers*, this Court reaffirmed the fundamental importance of the separation of powers principles that underlie the

doctrine of standing. This Court reiterated that the standing requirement "'is founded in concern about the proper – and properly limited – role of the courts in a democratic society,'" *id.* at 1148 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)), and restricts the judicial power "to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Id.* In this regard, the Court emphasized the importance of the "imminent" harm requirement by refusing to "replace" it with a lesser requirement that the dissent proposed. *Id.* at 1152-53. The Court also emphasized that plaintiffs must have a personal stake in the relief sought such that this relief would "affect *them*." *Id.* at 1149. The Ninth Circuit's ruling ignores these fundamental requirements.

Respondent argues that there is no conflict between the decision below and this Court's decisions because the court of appeals cited and quoted language from those decisions in its rulings. See, *e.g.*, Opp. at 2, 5-6. To be sure, as petitioners acknowledged, see Pet. at 15, the Ninth Circuit paid lip service to this Court's standing decisions. Federal courts, however, must do more than merely parrot constitutional principles that this Court has established. They must adhere to them. The Ninth Circuit failed to do so here, in three respects.

1. Petitioners demonstrated that the Ninth Circuit's decision conflicts with this Court's holding that plaintiffs must establish that standing existed at the time the action was filed. Pet. at 15-16 (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992)). Specifically, petitioners demonstrated – and respondent does not dispute – that the district court found that respondent presented "no evidence" at the

evidentiary hearing of her intent to return to the hotel at the time the complaint was filed because she was asked "no questions" that would elicit the relevant testimony. See Pet. App. 34a-35a.

Respondent merely points out that the Ninth Circuit recited the legal rule from *Lujan* and made a finding that tracks that rule, Opp. at 6, without confronting the district court's unequivocal finding of a complete absence of evidence that could satisfy respondent's burden of proof on this issue. Indeed, the Ninth Circuit conceded that respondent "was never explicitly asked whether she intended to return as of" the date the complaint was filed, and instead based its finding on "inference[s]" that it drew from her testimony about a later time period, Pet. App. 12a. The district court, however, did not draw these inferences and instead reached the diametrically opposite conclusion that the only plausible inference to draw from respondent's failure to address "obviously relevant" matters was that "the answers would not have established standing." *Id.* at 35a; see also *id.* at 20a (Rymer, J., noting that the relevant evidence "would have been but one question away"). The Ninth Circuit's sleight of hand with respect to the evidentiary gap simply cannot be reconciled with this Court's holding that plaintiffs must demonstrate a "real and immediate threat" of repeated injury at the time suit is filed, and not some later time. *Los Angeles* v. *Lyons*, 461 U.S. 95, 101-02 (1983); *Lujan*, 504 U.S. at 569 n.4.

2. Petitioners next demonstrated that the court of appeals abandoned any semblance of adhering to the requirement that plaintiffs must show a "real and immediate threat" of repeated injury to have standing to seek injunctive relief. Pet at. 16-19. As noted, this Court recently confirmed its strict

adherence to this requirement in *Summers*, 129 S. Ct. at 1148, 1152-53. Petitioners showed that the court of appeals' sole basis for finding that respondent had an intention to return to the hotel was her suggestion of a *possible* future business trip that *might* bring her *near* Santa Barbara at an *unspecified time* – a mere "some day" intention that cannot support a finding of a threat of imminent injury under this Court's precedent. See Pet. at 17-19; see also *Summers*, 129 S. Ct. at 1150-51 (confirming that "some day" intentions, *i.e.*, purported intentions that are not concrete and that lack a specific time frame, are insufficient to satisfy the real and immediate threat requirement).

Respondent again asserts that the Ninth Circuit recited the legal requirements contained in this Court's decisions and made findings that track these requirements. Opp. at 6-7. She further asserts that the Ninth Circuit's finding of standing is consistent with this Court's holdings because the court of appeals not only relied on the statement about the potential business trip, "but also on the fact that D'Lil had spent an afternoon looking for an accessible hotel for that trip." *Id.* at 7.

Respondent does not cite the single snippet of testimony that the Ninth Circuit relied on, for good reason: it does not support the court of appeals' finding of a concrete or imminent plan on her part to return to the Encina Lodge. Respondent's testimony (which the Ninth Circuit quoted only in part) was that she "thought [she] would be doing some more work in Solvang, and the Ramada is well-positioned between Solvang and Montecito." See Transcript of Evidentiary Hearing Regarding Standing ("Evid. Hrg. Tr.") at 50; compare Pet. App. 13a n.9. Respondent's "thought" that she might get additional work in Solvang – a city that is approximately 33 miles from

Santa Barbara – at an unspecified future time in no way establishes either a concrete or imminent plan to return to Santa Barbara. See *Summers*, 129 S. Ct. at 1150-51 (a "vague desire to return" to an area "is insufficient to satisfy the requirement of imminent injury"). Moreover, this testimony in fact *undermines* respondent's claim of an intention to return to the *Encina Lodge* because it shows that she was seeking a *different hotel* for this potential trip.[1]

In sum, at the absolute most, respondent's testimony established a mere "some day" intention on her part to return to the Encina Lodge, which this Court held in *Lujan* and reaffirmed in *Summers* is insufficient to establish standing. The Ninth Circuit simply ignored the principles established by this Court in finding standing here.

3. Finally, petitioners demonstrated that the court of appeals ignored this Court's decisions by relying on allegations in the complaint and statements from respondent's summary judgment declaration to fill the gaps in her testimony at the evidentiary hearing. Pet. at 19-20 (citing *Lujan*, 504 U.S. at 561, and *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883-89 (1990)). Respondent does not dispute that the court of appeals relied on allegations in the complaint and statements from respondent's summary judgment declaration, but instead argues that such reliance was appropriate – at least with respect to the declaration – because it was admitted into evidence at the hearing. Opp. at 7.

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[1] Similarly, respondent's testimony that she spent an afternoon looking for an accessible hotel in Santa Barbara for this hypothetical future trip, *see* Opp. at 7, cannot support – and again undermines – her claim that she sought to return *to the Encina Lodge*. Her testimony was that she "went to the Ramada Limited" to "check it out." *See* Evid. Hrg. Tr. 49-51.

This ignores, however, that once respondent's sworn testimony was tested through cross-examination at the hearing, her prior allegations and assertions – which were not so tested – should have "fall[en] by the wayside." Pet. App. 19a (Rymer, J., dissenting). This Court's express holding that the plaintiff's burden is to establish each element of standing "with the manner and degree of evidence required at the successive stages of the litigation," *Lujan*, 504 U.S. at 561, is not a mere technical rule of procedure. The "facts" that establish standing in the ADA context are entirely within the plaintiff's knowledge and control. Accordingly, when plaintiffs have a full opportunity to make their case for standing at a hearing (as respondent did here), the relevant record is the testimony of the plaintiff – not earlier assertions in pleadings and motions. The Ninth Circuit ignored this Court's decisions in holding otherwise.

## II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS THAT REQUIRE ADA PLAINTIFFS SEEKING INJUNCTIVE RELIEF TO PRESENT ROBUST PROOF OF IMMINENT INJURY.

Petitioners further demonstrated (Pet. at 21-27) that the decision below merits review because it conflicts with decisions of other federal courts that have faithfully applied this Court's standing cases in the context of plaintiffs seeking injunctive relief under the ADA and other statutes. *Amicus Curiae* National Federation of Independent Businesses ("NFIB") demonstrated that lower federal courts have issued inconsistent decisions on the relevance and comparative importance of the factors that courts typically examine to determine the likelihood that an

ADA plaintiff will return to a particular public accommodation. See NFIB Br. 14-20. Respondent's attempt to reconcile and harmonize the lower court decisions is unavailing.

In material respects, *Shotz* v. *Cates*, 256 F.3d 1077 (11th Cir. 2001), is an analog to this case: both involve mere allegations of past discrimination, the absence of evidence of an actual attempt to return to the public accommodation, and no assertion of an intent to return at the time the complaint was filed. Yet the Eleventh Circuit dismissed the plaintiffs' case for lack of standing on the ground that any likelihood of future discrimination was merely "'conjectural, hypothetical, or contingent,'" *id.* at 1082, while the Ninth Circuit found standing to exist. It is not enough to assert, as respondent does, that the cases are distinguishable because "the court below determined that [respondent's] testimony established her intent to return" to the Encina Lodge, Opp. at 8, because if the Eleventh Circuit had confronted the same record the Ninth Circuit faced in this case, the Eleventh Circuit likely would have dismissed. That is reason enough for the Court to grant certiorari.

Similarly, in *Access for America, Inc.* v. *Associated Out-Door Clubs, Inc.*, 188 F. App'x 818 (11th Cir. 2006) (per curiam), the court dismissed an ADA complaint for lack of standing because the plaintiff failed to establish "any reasonable chance of . . . revisiting" the targeted facility, "other than 'someday.'" *Id.* at 818. Here, in contrast, the Ninth Circuit inferred that revisitation was probable from mere evidence of a "some day" possibility. These disparate outcomes are directly attributable to the Eleventh Circuit's faithful adherence to this Court's standing decisions and the Ninth Circuit's refusal to abide by them. That *Access for America* is unpub-

lished does not affect the reality of inter-circuit conflict here; although no court may be bound, district courts nonetheless rely on whatever guidance is available, and their doing so here inevitably will drive results in the Eleventh and the Ninth Circuits in divergent directions.

Moreover, that *Animal Legal Defense Fund, Inc.* v. *Espy*, 23 F.3d 496 (D.C. Cir. 1994), did not involve the ADA is immaterial. Constitutional standing jurisprudence neither varies with nor depends on the underlying cause of action. In *Animal Legal Defense*, the plaintiffs' showing of likelihood of repeated injury was held insufficient for Article III standing based on evidence not meaningfully different from what respondent offered and what the Ninth Circuit declared constitutionally adequate here.

Respondent misunderstands the import of *Camarillo* v. *Carrols Corp.*, 518 F.3d 153 (2d Cir. 2008) (per curiam), and *Steger* v. *Franco, Inc.*, 228 F.3d 889 (8th Cir. 2000), two decisions that – like the Ninth Circuit's decision here – effectively abandoned the requirement that an ADA plaintiff demonstrate a risk of repeated injury by presenting evidence of concrete future plans to return to the facility at issue. These decisions demonstrate that the Ninth Circuit is not alone in departing from this Court's standing holdings in the ADA context. This bolsters the case for certiorari because a growing body of lower court precedent is swallowing this Court's standing rules.

Respondent also attempts to dismiss the numerous district court decisions that are in tension with or flatly contradict the outcome reached by the decision below, see Pet. at 24-26, on the ground that the Ninth Circuit purported to apply "the same law" as the district courts and "the outcomes differ only because of differences in the facts." Opp. at 10. It is always

true, of course, that cases involve different facts and it is true here that the court of appeals used language that tracks this Court's opinions. But the standards that courts employ must be measured by their actions and the outcomes that they reach, and not merely their words. Here, the plaintiffs in the cases that petitioners cite were all found to lack standing and, therefore, not permitted to proceed with their ADA injunctive suits. To be sure, the facts of those cases are not identical to the facts here, but they are strikingly similar in material respects – due in no small part to the common *modus operandi* employed by repeat ADA litigants who target hotels and other public accommodations.[2] The fact that respondent was found to have standing to pursue her suit simply cannot be reconciled with the outcomes of these other cases. This inconsistent application of Article III principles, which has resulted in disparities in access to the federal courts for similarly situated plaintiffs, is intolerable and warrants this Court's review.

In all events, because Article III is so fundamental to a proper separation of powers under the Constitution, this Court has granted certiorari to address Article III standing questions even in the absence of a clear conflict among the circuits. See, *e.g.*, *Summers*, 129 S. Ct. 1142.

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[2] As noted, Pet. at 27-29, serial ADA plaintiffs often target structures built before the ADA was enacted and demand that the current access requirements be met at great expense, even though they have no real need to use, or intent to return to, the facilities. Respondent, for example, sued and settled with six hotels that she visited in Redding, California on a single day, and has never returned to any of them or even checked to see whether the remediation was completed. *See id.* at 8.

## III. THE COURT OF APPEALS' ADA STANDING RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

Petitioners also demonstrated (Pet. at 27-31) that the court of appeals' dilution of this Court's standing principles in the ADA context presents a recurring and important question of federal law because it will contribute to the proliferation of ADA private enforcement actions in which the plaintiffs have no real or personal stake in the injunctive relief that they seek. NFIB provided additional compelling evidence of the enormous growth in and deleterious effects of serial ADA injunctive suits, and the inevitable role that the court of appeals' decision will have in facilitating such suits. In particular, NFIB documented the "devastating effects" of such suits on small businesses, which are often "targeted" by ADA plaintiffs and their counsel. NFIB Br. 6, 9; see also *id.* at 8-9 (noting that such suits have not only caused job and revenue losses, but also have caused small businesses to fail).

Respondent does not attempt to deny the explosion in serial ADA litigation or the societal and economic costs that it imposes – a phenomenon that federal courts have recognized and documented. See Pet. at 27-30. Instead, respondent asserts that petitioners are merely criticizing "Congress's decision to rely on a private right of action" and "the statutory scheme." Opp. at 13. This argument is wide of the mark. Petitioners have no quarrel with the availability of the private right of action or the remedies that the ADA provides.

Petitioners' argument is that this case presents an important question of federal standing law because the decision below eviscerates constitutional principles that this Court has established to ensure that

federal courts – which are courts of limited jurisdiction – entertain suits for injunctive relief only when the plaintiffs face a real and immediate threat of future injury. These standing principles apply to all suits, including ADA suits. See *Raines* v. *Byrd*, 521 U.S. 811, 820 (1997) (refusing to relax Article III standing principles "for the sake of convenience and efficiency"). Indeed, as shown, Pet. at 30, in the ADA context, standing principles serve as a critical check to ensure that plaintiffs have a personal stake in the injunctive relief they seek. Here, however, the Ninth Circuit abandoned this Court's standing principles and allowed an ADA private enforcement suit to go forward in circumstances where the plaintiff failed to show any personal stake or any threat of immediate repeated injury – thereby facilitating the growing "cottage industry" in similar suits. The court of appeals' departure from Article III standing principles in the ADA context therefore presents an important question of federal law that only this Court – and not Congress – can address.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

122 MOTION FILED
MAR 6 - 2009

No. 08-993

In The
# Supreme Court of the United States

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## BEST WESTERN ENCINA LODGE & SUITES, ET AL.,

*Petitioners,*

v.

## HOLLYNN D'LIL,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF THE PETITIONERS

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## INTEREST OF *AMICUS CURIAE*[1]

The interest of *amicus* is set forth in the accompanying motion for leave to file this brief.

## SUMMARY OF THE ARGUMENT

In addition to the reasons set forth in the Petition, which convincingly demonstrate that this case warrants the Court's attention, the Court should be aware of additional reasons that make this an appropriate case for Supreme Court review. First, frivolous Americans with Disabilities Act ("ADA") litigation is enormously harmful to small businesses across the country. This Court should grant certiorari so that America's small businesses are better able to defend against meritless lawsuits. Second, the Ninth Circuit's decision that D'Lil had standing to bring this suit is clearly at odds with this Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). This Court should grant certiorari to reverse this incorrect decision. Finally, widespread confusion amongst federal courts regarding ADA standing requirements precipitated the Ninth Circuit's erroneous decision. We ask this Court to grant certiorari so that the lower courts can benefit from this Court's guidance in deciding future cases.

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[1] Pursuant to Rule 37.2, *amicus curiae* provided counsel of record for all parties 10 days notice of its intention to file an amicus brief. Counsel for petitioners consented to the amicus brief in writing. Respondent's counsel refused consent. Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the accompanying brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

## REASONS FOR GRANTING THE PETITION

### I. DUBIOUS SUITS LIKE D'LIL'S HAVE WROUGHT ENORMOUS HARM ON SMALL BUSINESSES

Review of this case will help ensure that the ADA fulfills its intended purpose of protecting disabled individuals from discrimination. The ADA was signed into law by President George H.W. Bush on July 26, 1990. The stated goal of the legislation was to eliminate discrimination against individuals with disabilities. 42 U.S.C. § 12101(b). The statute thus sought to remedy a variety of problems, among them the barriers that disabled individuals face in accessing places of public accommodation like restaurants, hotels, and movie theaters. U.S. Small Business Administration and U.S. Department of Justice, Americans with Disabilities Act: ADA Guide for Small Businesses 1 (1999), *available at* http://www.sba.gov/ada/smbusdgd.pdf.

Yet ADA litigation is growing far more dramatically than its congressional drafters might have imagined. The profitability of this litigation has given birth to a veritable "cottage industry." *See, e.g., Rodriguez v. Investo LLC*, 305 F. Supp. 2d 1278, 1280-81 (M.D. Fla. 2004). Ambitious plaintiffs' lawyers have an easy time finding such targets because the ADA's requirements are so complex. The ADA regulates everything from the permissible height of countertops and mirrors in newer or renovated buildings, to the weight of swinging entrance doors, to the exact location where grab bars must be located in toilets. Walter K. Olson, *The ADA Shakedown*

*Racket*, City Journal, Winter 2004, *available at* http://www.city-journal.org/html/14_1_the_ada_shakedown.html. One estimate indicates that an average bathroom has to meet 95 different standards. *Id.*

A senior vice president of the American Association of People with Disabilities, recently observed, "I have not found anything that's 100 percent compliant with the ADA." *Id.* Another estimate holds that less than 2 percent of businesses nationwide are actually in full compliance with the ADA. Carri Becker, Note, *Private Enforcement of the Americans with Disabilities Act Via Serial Litigation; Abusive or Commendable?* 17 Hastings Women's L.J. 93, 99 (Winter 2006). The Department of Justice and the Equal Employment Opportunity Commission attempted to solve this problem by issuing an ADA guide for business owners. It is telling, though, that one such document touted as "user friendly" by both agencies is over 600 pages long. *See* Equal Employment Opportunity Commission & Department of Justice, *Americans with Disabilities Act Handbook* (1992).

The plaintiffs' lawyers schemes typically work as follows: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have the potential plaintiff seek out any and all violations of the ADA. Instead of informing the business of the omissions and giving the firm an opportunity to come into compliance with the ADA, the plaintiff and her attorney file a lawsuit. Typically, in a letter announcing the plaintiff's intention to sue, plaintiff's counsel offers to drop the lawsuit in exchange for a cash

settlement. *See, e.g.*, Becker at 115 n. 31. Faced with the threat of costly litigation, most businesses agree to pay out the settlement. *See, e.g., Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004).

As one federal court observed, the result of this scheme is that "the means for enforcing the ADA (attorney's fees) have become more important and desirable than the end (accessibility for disabled individuals)." *Mandarin Touch*, 347 F. Supp. 2d at 863 (*quoting Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004)). Serial plaintiffs serve as "professional pawn[s] in an ongoing scheme to bilk attorney's fees." *Id.* (quoting *Rodriguez*, 305 F. Supp. 2d at 1285). It is a "type of shotgun litigation [that] undermines both the spirit and purpose of the ADA." *Id.* (quoting *Brother*, 331 F. Supp. 2d at 1375).

In one typical case, the Philadelphia firm Brodsky & Smith filed over 100 lawsuits within a six-month time period on behalf of two disabled men, reaping thousands of dollars in attorneys' fees. Walter K. Olson, *The ADA Shakedown Racket*, City Journal, Winter 2004, *available at* http://www.city-journal.org/html/14_1_the_ada_shakedown.html. The two complainants have since established the non-profit American Disability Institute, which plans to roll out 400 to 500 suits a month until more than 5,000 businesses have been cited for ADA violations. *Id.* Only then, these gentlemen claim, will they achieve their mission of bringing all businesses in the Philadelphia area into compliance with the ADA. *Id.*

In another example, a Florida attorney named John Mallah filed 740 such lawsuits against Florida businesses in fewer than four years. Becker, *citing* Bob van Voris, South Florida's ADA Industry, *The National Law Journal*, July 16, 2001, at A1. Mallah brought each of these suits on behalf of his elderly uncle; the pair settled each for approximately $3,000 to $5,000 in legal fees. *Id.*

ADA litigation has also proliferated in California, where plaintiffs can join state law claims to their federal ADA claims and thus recover money damages. Private plaintiffs are not eligible for money damages under the ADA, though they may receive injunctive relief and attorneys' fees. But, in California, most ADA violations also violate California's Unruh Act, for which plaintiffs can receive treble damages. Cal. Civ. Code § 51(f) (West 2008). California plaintiffs therefore typically join their state and federal claims to ensure eligibility for monetary and injunctive relief as well as attorneys' fees.

These drive-by lawsuits disproportionately damage small businesses. First, small businesses are more vulnerable than larger firms. Nationwide, approximately one-third of new small businesses fail within the first two years of operation. U.S. Small Business Administration website, FAQs: Frequently Asked Questions, *at* 1, http://web.sba.gov/faqs/faqindex.cfm?areaid=24 (last visited March 3, 2009). Second, it is also more difficult and expensive for small businesses to comply with the panoply of regulations imposed on them by state and federal governments. The U.S. Small Business Administration reports that small

firms spend an average of 45 percent more per employee than large firms on compliance with federal regulations. Frequently Asked Questions, *supra*, at 1.

NFIB member businesses are targeted by vexatious litigants and their counsel. Jarek Molski filed lawsuits against 400 different businesses before a federal district court finally declared him a "vexatious litigant." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1061 (9th Cir. 2007). Many of his complaints were factually similar, focusing on the configuration of restroom stalls at a business. *Id.* at 1051. He often alleged injuries to his hands or upper extremities when the stalls were too narrow. *Id.* at 1050-51. Molski appeared to have little interest in returning to any of these businesses once the premises had been made safe. Instead, his "consistent approach was to use the threat of money damages under California law to extract cash settlements and move on to his next case." *Id.* at 1052.

Molski frequently targeted small businesses, among them NFIB members. One member reported that he was worried that the litigation and associated renovations could force him out of business. Mike Lee owns a small restaurant in Pismo Beach, Calif. The restaurant only has room for 17 tables, so Lee counts on his ability to maintain a steady flow of customers to keep the business open. Unfortunately, Mr. Molski visited Lee's business in 2005. Molski alleged that the restroom stalls were too small and that he injured his hands during a visit. Molski filed suit and Lee settled. That settlement nearly cost Lee his business. He had to

borrow $80,000 – half of which represented the cost of the renovations and the remainder of which represented the cost of settlement and attorney fees. According to Lee, it took two weeks to renovate the restrooms, and he was only able to keep the restaurant open limited hours during that time. He reports that his sales were drastically reduced during the renovation. Given the cost and the impact on his business, there is a real question as to whether these renovations were even required by the ADA. Yet, despite the cost and ruinous impact on his business, the renovations were a more affordable option than financing litigation with an uncertain outcome.

Sacramento area attorney Scott Johnson implemented a similar scheme. Johnson, who is disabled, files suits on his own behalf seeking both injunctive relief under the ADA and damages under California's Unruh Act. Marjie Lundstrom and Sam Stanton, *The Price of Access, Part 2: Frequent Fliers*, The Sacramento Bee, November 13, 2006. Johnson targets small businesses in the Sacramento area. *Id.* His complaints generally charge businesses with failure to have legally necessary van-accessible parking. *Id.* Although Johnson claims to send warnings to businesses before he files suits, many business owners report never receiving such warnings prior to getting a complaint with a demand for payment of $4,000 or more. *Id.*

Johnson targeted NFIB member Kumar Shankar's business. Shankar's business has a small lot that includes room for tow trucks to drop off cars for repair. Johnson sued, alleging that there was not enough room for disabled parking in the lot.

Shankar paid $3,500 to settle the suit and also spent additional funds reconfiguring the parking lot. The renovation of the parking lot eliminated the tow truck drop zone, causing a dramatic decline in sales. The drop in sales forced Shankar to fire two of his four employees. Though these consequences were devastating for Shankar and his employees, Shankar reports that he had little alternative. Challenging Johnson in court was a more expensive option and might have even forced him to close his business altogether.

ADA lawsuits have led to the closure of other firms. Roy's Drive-In was a landmark in Salinas, Calif., since the 1950s. Becker, citing Jonathan Segal, *Roy's Drive-In Checks Out: Salinas eatery faced lawsuit over access*, Monterey Herald, Sept. 21, 2004, *available at* http://www.montereyherald.com/mld/montereyherald/news/972043.htm. The 61-year-old owner, Roger Patterson, closed his doors after Molski brought suit. *Id.* Patterson said that, while he could have spared the $10,000 necessary to bring the business into compliance, he could not afford to pay legal fees and damages. *Id.*

On Lock Sam, a Chinese restaurant in Stockton, Calif., also closed its doors because of an ADA suit. Becker, citing Howard Lachtman, *On Lock Sam leaves a little less than "contented hearts,"* Record Net, Apr. 2, 2004; *at* http://www.recordnet.com/articlelink/040204/lifestyle/articles/040204-1-9.php. The restaurant was founded in 1898 and was owned by the same family since 1920. *See* Walter Olson, *Access suit closes landmark Calif. eatery*, Overlawyered, Sept. 2, 2003,

*available at* http://www.overlawyered.com/archives/000291.html. The closing sparked uproar in the Stockton community, with many disabled Stockton residents among those decrying the restaurant's closing. *Id.*

As the above examples demonstrate, frivolous ADA claims – brought by plaintiffs who lack standing under *Lujan* to bring such suits – have devastating effects on small businesses across the nation. These suits contribute directly to the loss of jobs – as in Kumar Shankar's case – and to huge revenue losses as in Mike Lee's case. Lee and Shankar were lucky enough not to lose their businesses because of ADA suits, but the experiences of Roy's Drive-In and On Lock Sam show that other small firms are not so fortunate. If the federal courts continue to construe standing rules liberally in ADA cases, small businesses will suffer irreparable harm from dubious claims.

## II. BECAUSE D'LIL'S INJURY IS MERELY CONJECTURAL AND HYPOTHETICAL AND CANNOT BE REDRESSED BY A FAVORABLE DECISION, THE NINTH CIRCUIT'S RULING IN THIS CASE CONFLICTS WITH THE STANDING REQUIREMENTS SET FORTH IN *LUJAN V. DEFENDERS OF WILDLIFE*

This Court's standing jurisprudence is rooted in Article III, Section 2 of the U.S. Constitution, which states that "[t]he judicial power shall extend to all Cases... [and] to Controversies." This constitutional standing requirement serves as a check on the power of the judiciary in accordance

with the Constitution's separation of powers provisions. To meet this constitutional standing requirement, a plaintiff must demonstrate the following: (1) that she has suffered an injury in fact that is concrete and particularized and actual or imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that the injury is likely, as opposed to merely speculative and will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiff must meet these standing requirements at the time the lawsuit is filed. *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 190-91 (2000).

D'Lil failed to meet two of *Lujan*'s constitutional standing requirements. First, as the trial court correctly ruled, D'Lil did not suffer an injury in fact that was actual or imminent. *See D'Lil v. Best Western Encina Lodge & Suites*, 415 F. Supp. 1048 (C.D. Cal. 2006). Rather, any harm to D'Lil was conjectural or hypothetical – the kind of "some day" injury that the Court specifically rejected as insufficient to confer constitutional standing in *Lujan*.

Second, because it is unclear that D'Lil will ever return to the Best Western Encina Lodge once this litigation ends, any injury she suffered cannot be redressed by a favorable court decision. She thus failed to meet the third standing requirement articulated in *Lujan*. 504 U.S. at 560-61. Neither the district court nor the Ninth Circuit decisions in this case specifically addressed redressability. But this Court may properly raise standing concerns *sua sponte*. *Adarand Contractors, Inc. v. Mineta*, 534

U.S. 103, 110 (2001); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). It should consider doing so to ensure a just and lawful outcome in this case and to provide guidance to other courts.

A. D'Lil Did Not Suffer An Injury In Fact

To meet the first constitutional standing requirement, a plaintiff must suffer an injury in fact that is concrete and particularized and actual or imminent, not merely conjectural or hypothetical. *Lujan* at 560-61. If a plaintiff merely expresses "some day" intentions of returning to the site of her alleged injury – without any description of concrete plans, and failing to specify when that "some day" will be – then that plaintiff has not fulfilled this first requirement. *Id.* at 564. In *Lujan*, for example, the plaintiffs alleged that projects funded by the Department of the Interior in Egypt and Sri Lanka would harm endangered species in the areas. *Id.* at 558. Plaintiffs testified that they had previously visited the sites to view wildlife. *Id.* at 564. But the plaintiffs did not have any concrete plans to visit the sites again. Because their future plans to visit the sites of the challenged construction were unclear, this Court determined that the plaintiffs had not suffered "injury in fact" sufficient to confer constitutional standing. *Id.*

Similarly, D'Lil only expressed vague, "some day" intentions of plans to return to the Best Western Encina Lodge. Although D'Lil traveled to Santa Barbara before upon the request of her attorney, Jason Singleton, *D'Lil v. Best Western Encina Lodge & Suites*, 415 F. Supp. 2d 1048, 1059 (C.D. Cal. 2006), she did not express any specific

plans to return to Santa Barbara in connection with her work as an accessibility consultant. Evidence submitted to the district court concerning D'Lil's friendship with the Marshes, a family living in Santa Barbara, showed only that D'Lil had vague intentions of returning to Santa Barbara some day. But D'Lil never presented specific evidence, as required by *Lujan*, of definitive travel plans. *Id.*

Even assuming that D'Lil planned to return to Santa Barbara, D'Lil did not present evidence that she would be more likely to stay at the Best Western Encina Lodge than at another hotel. In fact, in earlier litigation, D'Lil testified that she preferred Ramada hotels and that a Santa Barbara area Ramada is convenient for visiting personal friends. *Id.* And, in another instance, D'Lil claimed to be particularly confident in the Radisson brand. *Id.* at 1056. In light of this lack of evidence of concrete plans to return to the Best Western Encina Lodge – and, indeed, evidence indicated that D'Lil might wish to stay elsewhere on future trips to Santa Barbara – the Ninth Circuit wrongly concluded that D'Lil suffered an injury in fact.

### B. A Favorable Decision Cannot Redress D'Lil's Injury Because She Only Visited the Best Western Encina Lodge to Establish an ADA Claim

For a plaintiff to have Article III standing, it must be likely (as opposed to merely speculative) that the plaintiff's injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561. If a plaintiff only visits a particular business to establish grounds for litigation against that business, it is

unlikely that the plaintiff would return to that business once her lawsuit is complete. *See, e.g., Harris v. Stonecrest Auto Care Center LLC*, 472 F. Supp. 2d 1208 (S.D. Cal. 2007). In *Harris*, a disabled plaintiff visited a Shell gas station in California hundreds of miles away from his home. *Harris*, 472 F. Supp. 2d at 1210. The plaintiff made a number of allegations regarding the accessibility of the gas station, among them that the counter inside the convenience store was too high for him and that he could not reach the gas pumps. *Id.* at 1211. The plaintiff had filed over 20 ADA claims against other businesses. *Id.*

Because the distance of the gas station from the plaintiff's home and the plaintiff's prior litigation history indicated that the plaintiff visited this particular gas station only once to establish a legal claim against it, a favorable decision could not redress plaintiff's injury. *Id.* at 1217. That is, any permanent injunction obtained in the course of that litigation might benefit future disabled visitors to that Shell station, but it could not benefit the plaintiff. *Id.* On the other hand, if a plaintiff clearly intends to return to the business after litigation is over, then a favorable decision can redress that plaintiff's injuries, and the constitutional requirement is met. *Id.*

The evidence clearly showed that D'Lil visited the Best Western Encina Lodge solely to establish an ADA claim. D'Lil, like the plaintiff in *Stonecrest Auto Care Center*, had a long history of bringing ADA lawsuits. She admitted to filing 62 prior lawsuits, raising the question as to whether she could feasibly patronize all of these firms again.

*D'Lil v. Best Western Encina Lodge & Suites*, 415 F. Supp. 2d 1048, 1058 (C.D. Cal. 2006). In fact, D'Lil frequently targeted hotels. In the district court, D'Lil testified that she sued Howard Johnson Express Inn in Redding, Calif., the Bel Air Motel in Redding, the Red Lion Inn in Redding, the Best Western Inn in Redding, and the Best Western Hospitality House in Redding. *Id.* D'Lil also testified that all of these cases had settled, and that she had not returned to any of these hotels after the settlement. *Id.* Nor had she checked to see if accessibility-related renovations had been accomplished. *Id.*

As the district court observed, "it appears Plaintiff declares that she intends to return to nearly every place she sues (as indeed she must in order to establish standing in federal court.)" In light of D'Lil's litigious history and inconsistent allegations made during past litigation, this Court should view her statements about future travel to the Encina Best Western Lodge with skepticism. Because it is unlikely that D'Lil would have returned to the Best Western Encina Lodge, a favorable court award would not have redressed her injury, and she lacked standing to sue.

## III. FEDERAL COURTS HAVE ISSUED INCONSISTENT STANDING DETERMINATIONS IN ADA CASES

Federal courts generally examine four factors to establish the likelihood that an ADA plaintiff will return to a particular public accommodation. Among them are (1) the proximity of the place of public accommodation to plaintiff's residence; (2) plaintiff's

past patronage of defendant's business; (3) the definitiveness of plaintiff's plans to return; and (4) the plaintiff's frequency of travel near defendant's establishment. *Molski v. Arby's Huntington Beach*, 359 F. Supp. 2d 938, 947 (C.D. Cal. 2005). But, as the trial court in this case noted, reported decisions provide little guidance on how to apply and evaluate the factors. This ambiguity provides two additional reasons why this Court should grant this petition for certiorari. First, D'Lil would not have prevailed if the Ninth Circuit applied this four-factor test in a different manner. Certiorari is thus necessary to ensure a just outcome in this case. Additionally, ambiguity in this area of law shows that additional guidance is needed to ensure just results in future litigation.

First, the lower courts disagree on the relevance of proximity in evaluating the likelihood of a plaintiff's return where the relevant place of public accommodation is a hotel. In *Brother v. Tiger Partner, LLC*, a Florida federal district court found no standing where the plaintiff lived more than 280 miles away from a particular hotel and only traveled there twice a year. 331 F. Supp. 2d 1368, 1373 (M.D. Fla. 2004). But in *Access 4 All v. Wintergreen Common Partnership Ltd.*, a Texas district court concluded that the proximity factor should not be considered in cases involving hotels. 2005 WL 2989307, 3-4, 2005 U.S. Dist. LEXIS at 10-11 (N.D. Tex. Nov. 7, 2005).

Had the Ninth Circuit considered proximity and followed the approach of *Brother v. Tiger Partner*, it would have reached a different result. D'Lil lives about 400 miles away from the Encina

Best Western Lodge and typically traveled to Santa Barbara between 1 to 3 times per year. In *Brother v. Tiger Partner*, the plaintiff lived slightly closer to the defendant hotel (280 miles away) and made a similar number of visits per year (about two) to the city in which it was located. 317 F. Supp. 2d at 1373. The Middle District of Florida found that this lack of proximity to the plaintiff's residence relevant to standing. Yet the district court determined, like the court in *Access 4 All*, that the proximity of D'Lil's home to the Best Western Encina Lodge was of minimal relevance. *D'Lil*, 415 F. Supp. 2d at 1055.

Some courts have also found that the lack of prior patronage by the plaintiff negates the possibility of future injury at a business. *Molski v. Mandarin Touch Rest.*, 385 F. Supp. 2d 1042, 1045 (C.D. Cal. 2005). In *Brother v. CPL Investments*, a Florida federal court similarly found that, where an ADA plaintiff never stayed at a particular hotel and did not keep a subsequent reservation, this plaintiff lacked standing in part based on lack of past patronage. 317 F. Supp. 2d 1358, 1369 (S.D. Fla. 2004).

There is also confusion in the lower courts involving the relevance of a plaintiff's patronage of other locations of a particular chain. In *Pickern v. Holiday Quality Foods*, for example, the court found standing in a case involving a particular Holiday store near the plaintiff's grandmother's house because the plaintiff frequently shopped at other Holiday branches. 293 F.3d 1133 (9th Cir. 2002). *See also Molski v. Mandarin Touch Rest.*, 385 F. Supp. 2d 1042 (C.D. Cal. 2005) (plaintiff had standing to pursue his ADA claim because the defendant

restaurant was part of a chain, which the plaintiff frequented). On the other hand, in *Brother v. Tiger Partner*, a Florida court rejected a nearly identical argument regarding plaintiff's past patronage: "That [plaintiff] has visited the Best Western Deltona Inn in the past proves nothing. And in view of his extensive litigation history, Mr. Brother's professed intent to return to the property is insufficient." 331 F. Supp. 2d at 1374.

Had the Ninth Circuit considered D'Lil's lack of past patronage of Petitioners' hotel or other Best Western locations, it might have reached a different result. D'Lil admitted that she never stayed at the Encina Lodge before the visit giving rise to her lawsuit. 415 F. Supp. 2d at 1056. Nor did D'Lil state a preference for the Best Western brand, though such a preference would have been relevant. In fact, in other lawsuits, D'Lil claimed a "certain preference for the Ramada brand" and alleged that she had confidence in the Radisson brand. *Id.* Though the district court found that consideration of this factor weighed against plaintiff, the Ninth Circuit did not directly address it. 415 F. Supp. 2d at 1048.

The lower federal courts should consider past patronage. ADA plaintiffs who regularly patronize a business are more likely to suffer the injuries in fact necessary to confer constitutional standing. Similarly, ADA plaintiffs who visit businesses multiple times may have their injuries redressed through favorable court decisions. Weighing this factor appropriately will ensure that cases brought only to extract quick settlements do not waste court resources.

Courts are also divided over the evidence required to establish plaintiff's intent to return to a business. Where a plaintiff lacks concrete plans to return, a court must ensure that the plaintiff's professed intent to return is sincere and supported by facts. Many courts have thus concluded that a "serial plaintiff's extensive litigation history can undermine his professed intent to return." *Molski v. Mandarin Touch Rest.*, 385 F. Supp. 2d at 1046. While plaintiff Molski sued over 400 businesses across the state of California within a short time period, Molski returned to very few of those firms following litigation. *Id.* *See also Molski v. Arby's Huntington Beach*, 359 F. Supp. 2d at 948 ("the filing of hundreds of lawsuits may impact Mr. Molski's credibility and the believability of his assertions that he intends to and will return to Arby's"). Similarly, a [Florida] district court found it "simply implausible" that a plaintiff might return to all 54 of the different places of public accommodation that she sued. *Brother v. Tiger Partner*, 331 F. Supp. 2d at 1368.

Had the Ninth Circuit weighed this factor appropriately, it likely would have found that D'Lil lacked standing. D'Lil presented no evidence of concrete plans to return to Santa Barbara, nor any concrete plans to return to the Best Western Encina Lodge in particular. *D'Lil*, 415 F. Supp. at 1059. In fact, as discussed above, D'Lil testified in earlier litigation that she might be more likely to stay at other hotel chains that she preferred. *Id.* at 1058. The district court also found that D'Lil's vague statements about future plans to return to Santa Barbara lacked credibility because of her long history of litigiousness. *Id.* at 1059. It thus

concluded that this factor weighed against the plaintiff. *Id.* Yet the Ninth Circuit again declined to give this factor much weight in its analysis.

The lower federal courts should look closely at the concreteness of an ADA plaintiff's plans to return to a particular business. Doing so will ensure that only meritorious ADA claims go forward and extinguish claims brought merely to extract cash payments.

Courts have also issued inconsistent decisions on whether the frequency of plaintiff's travel plans is relevant to standing determinations. *See, e.g., Wilson v. Kayo Oil Co.*, 535 F. Supp. 2d 1063, 1069 (S.D. Cal. 2007); *Molski v. Kahn Winery*, 405 F. Supp. 2d 1160, 1168 (C.D. Cal. 2005). In *Access 4 All*, for example, a court found that the plaintiff lacked standing because, while he presented evidence that he travelled frequently, he had not presented any evidence that he would return specifically to the De Soto area. 2005 WL 2989307 4-5, 2005 U.S. Dist. LEXIS 26935 at 12-13. Likewise, in *Brother v. Tiger Partner*, a plaintiff who traveled 1 to 2 times per year to a city 280 miles away from his home lacked standing to bring a claim against a hotel located in that city. 331 F. Supp. 2d 1368, 1373 (M.D. Fla. 2004). By contrast, in *Assoc. for Disabled Americans v. Claypool Holdings LLC*, the court found that the plaintiff had suffered an injury in fact because he traveled to Indianapolis, where the defendant's hotel was located, every 1 to 2 years for family reunions and for alternating Thanksgiving and Christmas holidays. 2001 WL 1112109 (S.D. Ind. 2001).

Because D'Lil typically traveled 1 to 3 times per year to Santa Barbara, where the Encina Lodge is located, this factor supported a finding that D'Lil did not have standing. As noted above, D'Lil traveled to Santa Barbara as infrequently as the plaintiff in *Brother v. Tiger Partner*. Just as the plaintiff lacked standing in *Tiger Partner*, D'Lil also lacked standing. It is true that, if the Ninth Circuit had looked to *Claypool Holdings* instead of *Tiger Partner* for guidance, it might have reached the opposite conclusion regarding this factor. But taking the approach of *Claypool Holdings* will make it more difficult to keep frivolous ADA lawsuits out of federal courts. Moreover, the differing outcomes only underscore why certiorari is necessary to resolve confusion within the lower courts.

## CONCLUSION

For the reasons set forth above and in the Petition, the Petition should be granted.

Respectfully submitted,

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